Supreme Court, U.S.
FILED

No. 04 126 JUL 14 2004

OFFICE OF THE CLERK

In the

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

MARY BRAGGS,

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorney for Petitioner

Of Counsel:

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois

RENEE G. GOLDFARB
Counsel of Record
JOHN E. NOWAK
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

Printed by Authority of the State of Illinois (P.O. 41369—53—7-14-04)

QUESTION PRESENTED

Whether a court must consider a defendant's mental capacity when determining whether the defendant was "in custody" for purposes of *Miranda v. Arizona*.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

I. THE ILLINOIS SUPREME COURT'S CONSIDERATION OF THE DEFENDANT'S MENTAL CAPACITY IN DETERMINING WHETHER THE DEFENDANT WAS "IN CUSTODY" UNDER *MIRANDA* CONFLICTS WITH *YARBOROUGH V. ALVARADO* AND OTHER DECISIONS OF THIS COURT HOLDING THAT THE CUSTODY INQUIRY IS AN OBJECTIVE TEST 8

II. THE ISSUE OF WHETHER THE OBJECTIVE CUSTODY TEST SHOULD CONSIDER THE SUSPECT'S PARTICULAR CHARACTERISTICS HAS NOT BEEN SQUARELY RESOLVED BY THIS COURT 12

III. THE STATE COURTS HAVE SPLIT OVER WHETHER A SUSPECT'S MENTAL CAPACITY MAY BE CONSIDERED IN MAKING A *MIRANDA* "CUSTODY" DETERMINATION 13

IV. A STANDARD THAT FORCES THE POLICE TO ASSESS A SUSPECT'S MENTAL CAPACITY IN ORDER TO DETERMINE WHETHER THAT SUSPECT WOULD BELIEVE HIMSELF OR HERSELF TO BE IN CUSTODY IS UNWORKABLE AND UNDERMINES THE CLARITY AND PURPOSE OF THE OBJECTIVE *MIRANDA* TEST 16

CONCLUSION 21

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases: PAGE(S)

Alvarado v. Hickman,
316 F.3d 841 (9th Cir. 2002), *cert. granted*,
— U.S. —, 124 S.Ct. 45 (2003) 8, 9

Atkins v. Virginia,
536 U.S. 304 (2002) 17, 18, 19, 20

Berkemer v. McCarty,
468 U.S. 420 (1984) 10, 15, 17, 18

California v. Behler,
463 U.S. 1121 (1983) 10

Colorado v. Spring,
479 U.S. 564 (1987) 17

Commonwealth v. Wallen,
619 N.E.2d 365 (Mass. App. Ct. 1993) 16

DeJesus v. State,
655 A.2d 1180 (Del. 1995) 15

Dunaway v. New York,
442 U.S. 200 (1979) 17

Miranda v. Arizona,
384 U.S. 436 (1965) ..... *passim*

Moran v. Burbine,
475 U.S. 412 (1986) 17

New York v. Quarles,
467 U.S. 649 (1984) 17

Oregon v. Mathiason,
429 U.S. 492 (1977) 10

People v. Dorsey,
499 N.YS.2d 806 (N.Y. App. Div. 1986) 16

People v. Hamilton,
831 P.2d 1326 (Col. 1992) 15

Stansbury v. California,
511 U.S. 318 (1994) 10, 15

State v. Fritschen,
802 P.2d 558 (Kan. 1990) 15

State v. Hickam,
692 P.2d 672 (Or. Ct. App. 1989) 14

State v. Jones,
570 S.E.2d 128 (N.C. Ct. App. 2002) 15

State v. Loveday,
C.C.A. No. 100, 1990 Tenn. Crim. App. LEXIS
438 (Tenn. Crim. App., July 5, 1990) 14

State v. Stauter,
C.A. Case No. 97 CA 72, 1998 Ohio App. LEXIS
3311 (Ohio Ct. App. July 17, 1998) 16

State v. Washington,
68 P.3d 134 (Kan. 2003) 14

State v. William,
807 P.2d 1192, cert. denied
502 U.S. 837 (Kan. 1991) 14

United States v. Little,
—- A.2d —-, No. 03-CO-452, 2004 D.C. App. LEXIS
337 (June 24, 2004) 13

United States v. Macklin,
900 F.2d 948 (6th Cir.),
cert. denied, 498 U.S. 840 (1990) 16

Yarborough v. Alvarado,
541 U.S. —-, 124 S.Ct. 2140 (2004) ..... *passim*

Constitutional Provision:

U.S. Const., Amend. V 2

Statutes:

28 U.S.C. § 2254(d) 12

Ark. Code Ann. § 5-4-618 (1993) 19

Ind. Code § 35-36-9-1 (1994) et seq. 19

Ky. Rev. Stat. § 532.130-532.140 (1990) 18

Other Authorities:

2 Wayne R. LaFave, Jerold H. Israel
& Nancy J. King, *Criminal Procedure*,
§ 6.6(c) (2d ed. 1999) 15

PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1 - App. 26) is reported at 209 Ill.2d 492, — N.E.2d — (2004). The opinion of the Illinois Appellate Court, First District (App. 27- App. 50), is reported at 335 Ill.App.3d 52, 779 N.E.2d 475 (2002). The November 17, 2000 order of the circuit court denying the respondent's motion to suppress (App. 51) is unreported. The opinion of the Illinois Appellate Court, First District (App. 52-59), in the respondent's first direct appeal is reported at 302 Ill.App.3d 602, 707 N.E.2d 172 (1998).

STATEMENT OF JURISDICTION

The original order and judgment of the Illinois Supreme Court was entered on December 18, 2003. The State filed a petition for rehearing. The Illinois Supreme Court entered its final order and judgment on April 15, 2004 when it denied the petition for rehearing and modified its opinion upon the denial of the petition. This petition for a writ of certiorari is filed within ninety days of that final order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Respondent Mary Braggs was charged under Indictment No. 93 CR 16707 for the murders of Connie Hall and Donald Rudolph. App. 1. The trial court initially refused to conduct a hearing on respondent's Motion to Suppress Statements. App. 1. The trial court found respondent unfit to stand trial and a discharge hearing followed. App. 1. During the discharge hearing, the trial court found that the evidence introduced against respondent was sufficient to establish beyond a reasonable doubt her guilt of first degree murder. App. 1. The trial court then remanded respondent to the Department of Mental Health and Developmental Disabilities for a period of five years. App. 1. In her first appeal, respondent argued that the trial court erred in refusing to conduct a hearing on her motion to suppress statements and that the evidence was not sufficient to establish proof beyond a reasonable doubt. App. 1. The appellate court held that the trial court erred when it refused to conduct a hearing on respondent's motion. App. 1. It also found that the evidence was sufficient beyond a reasonable doubt. App. 1. The appellate court then ordered the trial court to hear respondent's Motion to Suppress Statements. App. 1.

A hearing on respondent's Motion to Suppress Statements was held before the Honorable Stanley Sacks. App. 1-2, 51. During the hearing, the State presented the testimony of Chicago Police Detective Edward Winstead.

App. 1, 3. On April 29, 1993, Detective Winstead was assigned to investigate the deaths of Donald Rudolph and Connie Hall. App. 3. Both victims were found murdered in a first floor apartment located on South Prairie Avenue. App. 3. Connie had been stabbed to death, and Donald had been strangled. App. 3.

During Detective Winstead's investigation, he learned of a woman, later identified as respondent, who might have information relating to the crime. App. 3. On May 7, 1993, Detective Winstead received a phone call from a woman named Survilla Cameron, who stated that she lived with respondent and was respondent's sister and guardian. App. 3. She also told Detective Winstead that he could come over and talk to respondent. App. 3. Detective Winstead took Cameron and respondent to the police station to talk with them. App. 3. Prior to questioning, Cameron informed Detective Winstead that respondent was mentally incompetent and that respondent was "slow." App. 3. At the police station, Detective Winstead, Detective Redmond, Cameron, and respondent went into an interview room. App. 3. Respondent was not advised of her *Miranda* rights. App. 3.

During the conversation, respondent told them that she had been in the apartment on the day of the murders and two black males had come to the door. App. 4. According to respondent, an argument ensued, and she said that she had hidden in the closet. App. 4. Respondent told the police that when she came out of the closet, victim Hall was dead in the bedroom. App. 4. Respondent explained that Hall was wearing white and appeared to have been stabbed to death. App. 4. According to respondent, victim Rudolph was in the front room. App. 4. Respondent stated that Rudolph had been hit in the head with a wrench and had been strangled. App. 4. Detective Winstead noted that this was very similar to how the victims were found. App.

4. After the conversation, Detective Winstead brought respondent and Cameron home. App. 4.

On May 9, 1993, Detective Winstead and Detective Redmond went back to respondent's house. App. 4. They spoke to respondent, and Cameron was also present. App. 4. Respondent told them that one of the men who came to the apartment was named "Ron" and that he was a friend of a man named Cleo. App. 5. The other man was tall. App. 5. Pursuant to his investigation, Detective Winstead learned the identities of "Ron" and the tall man (named "Mike") and eventually picked up the two men and brought them to the police station. App. 5. The detective then went back to respondent's apartment and brought respondent and her sister to the police station. App. 5.

At the police station, Detective Winstead showed respondent a picture of Ron and Mike. App. 5. Respondent said that Mike was one of the men but that she was not sure about the other man. App. 5. Detective Winstead then told respondent that the two men were at the station. App. 5. Respondent then changed her story and said that they were not the two men who were at the apartment that day. App. 5. She then repeated her story that she hid in the closet. App. 5.

Later that same afternoon, Detective Winstead went with respondent and her sister to the apartment where the murders were committed. App. 5. Respondent pointed out where the bodies were found. App. 5. Respondent also showed Detective Winstead the closet in which she hid during the murders. App. 5. Detective Winstead examined the closet and noticed that the closet was filled with various items and that a person could not have fit inside it. App. 5. He then took respondent and her sister back to their home. App. 5-6.

On May 12, 1993, Detective Winstead picked up respondent and her sister and attempted to have a polygraph

examination administered to respondent. App. 6. The test could not be completed because respondent did not register enough emotion. App. 6. Detective Winstead subsequently brought respondent and Cameron home. App. 6. Respondent and Cameron subsequently changed residences. App. 6.

On June 25, 1993, Detective Winstead and Detective Redmond went to respondent's new apartment and picked up respondent and Cameron, respondent's sister. App. 6. They took them to the police station for further questioning. App. 6. Prior to the questioning, Detective Winstead told Cameron that the police were now looking at respondent as a potential suspect. App. 6. Detective Winstead read respondent her *Miranda* rights. App. 6. Respondent agreed to waive her rights. App. 6. After the conversation, respondent was placed under arrest. App. 7. Shortly after, respondent was interviewed by an assistant state's attorney, who also advised her of her *Miranda* rights. App. 7.

During the hearing on respondent's Motion to Suppress Statements, respondent presented the testimony of two psychologists. App. 7-8. Both Dr. Philip Pan and Dr. Linda Wetzel testified that respondent was unable to understand her *Miranda* rights. App. 7, 9. Dr. Pan noted that he examined respondent once in May of 1996 and once in August of 1999. App. 7. After conducting initial tests, he concluded that she suffered from moderate mental retardation and that she was unfit to stand trial. App. 7. Dr. Pan believed that it was unlikely that she could be restored to fitness any time in the near future. App. 7. When he tested her again in August of 1999, he continued to believe that she was not able to understand the *Miranda* warnings. App. 7. Dr. Wetzel testified that she examined respondent in May of 1994 and concluded that respondent was in the mentally retarded range and that she was unable to

understand her *Miranda* rights. App. 8. She tested respondent again in October of 1999 and reached the same conclusion. App. 9.

After hearing arguments from both sides, the trial court concluded that respondent did not knowingly waive her *Miranda* rights. App. 11. When considering whether or not she was in custody during her discussions with the police, the court concluded that up until the point where she was arrested, she was never in custody. App. 10-11. Moreover, the trial court determined that there was not even a suggestion that the police had done anything to coerce her into giving that statement. App. 10. The warnings given to her the morning of her arrest by Detective Winstead were "gratuitously offered" to her. App. 11. The court, however, further held that the statements made to the assistant state's attorney after the arrest were in violation of *Miranda*. App. 11. The court granted respondent's motion with regard only to the statements made to the assistant state's attorney after respondent's arrest and denied it as to respondent's first statement to the police, which was non-custodial and made without police coercion. App. 10-11.

On appeal, respondent argued that she was in custody at the time she arrived at the police station and gave her first statement, that the trial court's determination that she was not in custody until after her first statement was wrong, and that her waiver of her *Miranda* rights before her first statement was not valid. Respondent also argued that she did not speak to the police voluntarily in light of her mental capacity and that the trial court was required to hold a new discharge hearing. In its opinion, the appellate court never addressed whether respondent was in custody when she initially arrived at the police station. Instead, the appellate court held that it did not matter if respondent was in custody or that there was no police

coercion. App. 44. The Appellate Court held that the trial court erred by not determining "in a State law sense" whether respondent's statement was voluntary under the Due Process Clause of the Fourteenth Amendment solely based on respondent's diminished mental capacity "to understand the meaning and effect of the confession." App. 44, 50. The Appellate Court then reversed the trial court's order denying the motion to suppress the statements and remanded for a new hearing on the motion to suppress. App. 50.

The Illinois Supreme Court allowed the State's petition for leave to appeal. App. 3. Modifying the objective reasonable person standard for determining custody for purposes of *Miranda*, the Illinois Supreme Court held that respondent was in custody when she gave her first statement to the police because "a reasonable person with defendant's mental capacity would have believed he or she was in custody and not free to leave the police station." App. 19. The Illinois Supreme Court reached that conclusion by relying heavily on the Ninth Circuit Court of Appeals' decision in *Alvarado v. Hickman*, 316 F.3d 841, 848 (9th Cir. 2002), which this Court subsequently rejected in *Yarborough v. Alvarado*, 541 U.S. —, 124 S.Ct. 2140, 2151-52 (2004). App. 15-17. After a lengthy discussion of the Ninth Circuit's reasoning, the Illinois Supreme Court concluded that "[t]he same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned." App. 17. The Illinois Supreme Court then affirmed the appellate court's decision to suppress the statements respondent made to the detective prior to her formal arrest. App. 26. Given the Illinois Supreme Court's disposition of the custody issue, it expressly declined to reach the voluntariness issue on which the appellate court had based its decision. App. 26.

REASONS FOR GRANTING THE PETITION

I. THE ILLINOIS SUPREME COURT'S CONSIDERATION OF THE DEFENDANT'S MENTAL CAPACITY IN DETERMINING WHETHER THE DEFENDANT WAS "IN CUSTODY" UNDER *MIRANDA* CONFLICTS WITH *YARBOROUGH V. ALVARADO* AND OTHER DECISIONS OF THIS COURT HOLDING THAT THE CUSTODY INQUIRY IS AN OBJECTIVE TEST.

Adopting the reasoning in *Alvarado v. Hickman*, 316 F.3d 841, 848 (9th Cir. 2002), which this Court subsequently rejected in *Yarborough v. Alvarado*, 541 U.S. —, 124 S.Ct. 2140, 2151-52 (2004), the Illinois Supreme Court wrongly modified the objective test for determining custody under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1965), to include the consideration of the suspect's mental capacity. App. 15-17. The Ninth Circuit in *Alvarado*, 316 F.3d at 848, held that the objective custody test should be modified to include the consideration of a suspect's age and juvenile status. This Court, however, recently reversed the Ninth Circuit and rejected the notion that the objective custody test under *Miranda* should include the consideration of the suspect's individual characteristics, including the suspect's age. *Yarborough v. Alvarado*, 541 U.S. —, 124 S.Ct. 2140, 2151-52 (2004). As a result, the decision of the Illinois Supreme Court on this important federal constitutional question conflicts with this Court's recent decision in *Alvarado* as well as with this Court's consistent rule that the *Miranda* custody inquiry is an objective, not a subjective, test. Tellingly, not even once in its opinion does the Illinois Supreme Court ever acknowledge that the *Miranda* custody test is an objective one.

The Illinois Supreme Court held that the characteristics of the particular suspect must be incorporated into the

Miranda custody test when the suspect is mentally retarded. App. 15. In justifying that conclusion, the court relied heavily on the Ninth Circuit's decision in *Alvarado*, where the Ninth Circuit modified the objective reasonable person standard "to reflect what a reasonable juvenile would have thought in defendant's position" and "seemingly sanctioned a reasonable-juvenile standard to be applied to the determination of custodial interrogation." App. 15-17, *citing Alvarado*, 316 F.3d at 848. After a lengthy discussion of the Ninth Circuit's reasoning, the Illinois Supreme Court concluded that "[t]he same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned." App. 17. The court then applied its modified custody test and concluded that "a reasonable person *with defendant's mental capacity* would have believed he or she was in custody and not free to leave the police station." App. 19 (emphasis added).

The Illinois Supreme Court's so-called "modification" to the reasonable person standard transformed the objective *Miranda* custody test into a subjective one. The Illinois Supreme Court has now effectively substituted a subjective custody test, which incorporates the suspect's particular characteristics, for this Court's objective test. This conflicts with this Court's decision in *Alvarado*, which rejected the Ninth Circuit's reasoning, and this Court's consistent series of rulings that the *Miranda* custody inquiry is an objective test.

In *Alvarado*, this Court adhered to the objective custody test, noting that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." *Alvarado*, 124 S.Ct. at 2151. While the Illinois Supreme Court, like the Ninth Circuit in *Alvarado*, attempted to equate the *Miranda*

custody test with other inquiries, such as the voluntariness of a statement, that incorporate a person's individual characteristics, this Court explained that "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." *Ibid.* "The objective test furthers 'the clarity of [*Miranda*'s] rule,' . . . ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" *Ibid.* (*quoting Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984)).

The objective test necessarily focuses on the restrictive circumstances themselves rather than on the suspect's perceptions of them because "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Behler*, 463 U.S. 1121, 1125 (1983) (*quoting Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This Court has observed that "[o]ur decisions make clear that the initial determination of custody depends on the *objective* circumstances of the interrogation, *not on the subjective views harbored by* either the interrogating officers or *the persons being questioned.*" *Stansbury v. California*, 511 U.S. 318, 323 (1994) (emphasis added). To determine whether the circumstances surrounding the questioning are sufficiently restrictive to constitute custody, this Court has looked to "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442.

This Court observed in *Alvarado* that "[i]t is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation." *Alvarado*, 124 S.Ct. at 2151. The Ninth Circuit did just that when it "styled its inquiry as an objective test by considering what a 'reasonable 17-year-old, with no prior

history of arrest or police interviews' would perceive." *Ibid.* The Illinois Supreme Court, in following the Ninth Circuit's reasoning, did the same when it stated that "a reasonable person with defendant's mental capacity would have believed that he or she was in custody and not free to leave the police station." App. 19.

The Illinois Supreme Court's decision disregards this Court's objective custody test under *Miranda* and conflicts with this Court's decisions on this issue, including *Alvarado*. Just as the Ninth Circuit did in *Alvarado*, the Illinois Supreme Court "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics . . . could be viewed as creating a subjective inquiry." *Alvarado*, 124 S.Ct. at 2151-52. The Illinois Supreme Court relied heavily on the Ninth's Circuit's reasoning in effectively creating a subjective custody test that incorporates the characteristics of the suspect into the inquiry. This Court, of course, disagreed with the Ninth Circuit's reasoning and reversed its decision. *Ibid.* As a result, the decision of the Illinois Supreme Court in this case conflicts with this Court's decisions concerning the objective *Miranda* custody test, including *Alvarado*. Accordingly, petitioner respectfully requests that this Court grant *certiorari* or, in the alternative, vacate the Illinois Supreme Court's decision and remand for reconsideration in light of *Alvarado*.

II. THE ISSUE OF WHETHER THE OBJECTIVE CUSTODY TEST SHOULD CONSIDER THE SUSPECT'S PARTICULAR CHARACTERISTICS HAS NOT BEEN SQUARELY RESOLVED BY THIS COURT.

This case presents this Court with the opportunity to decide whether the *Miranda* custody test should include a consideration of the suspect's personal characteristics on direct appeal, outside the shadow of the standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). While this Court has repeatedly held that the *Miranda* custody inquiry is an objective one, and disagreed in *Alvarado* with the argument that this Court's prior cases *mandated* the consideration of a suspect's particular characteristics as part of the custody test, this Court did not squarely decide this issue on the merits in *Alvarado*.

This Court's rejection in *Alvarado* of the Ninth Circuit's consideration of the suspect's age and experience with the police into the "custody" test was made in the context of the standard set forth by the AEDPA. Under the AEDPA, "a federal court can grant an application for a writ of habeas corpus on behalf of a person held pursuant to a state-court judgment if the state-court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Alvarado*, 124 S.Ct. at 2144 (quoting 28 U.S.C. § 2254(d)). Although this Court appeared to reject consideration of a suspect's individual characteristics when applying the objective *Miranda* custody test, this Court's reasoning was limited to whether the state court had unreasonably applied clearly established federal law when it failed to consider the defendant's age and experience. *Id.* at 2152 ("For these reasons, the state court's failure to

consider Alvarado's age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law"). In fact, Justice O'Connor, in her concurring opinion, stated that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry." *Id.* at 2152 (O'Connor, J., concurring).

Given the standard of review applied in *Alvarado*, this Court did not have the opportunity to decide this issue squarely. As one court has noted, "[a]s is apparent, *Alvarado* did not strictly decide whether an accused's juvenile status is irrelevant to the *Miranda* custody determination. That was unnecessary for its decision." *United States v. Little*, — A.2d —, No. 03-CO-452, 2004 D.C. App. LEXIS 337, *14 (June 24, 2004). Free from the strictures of the AEDPA, this case presents the Court with the opportunity to squarely decide the issue of whether the objective *Miranda* custody test should incorporate a suspect's personal characteristics, such as a suspect's mental capacity, as part of that inquiry. This case will enable the Court to finally address this issue directly.

III. THE STATE COURTS HAVE SPLIT OVER WHETHER A SUSPECT'S MENTAL CAPACITY MAY BE CONSIDERED IN MAKING A *MIRANDA* "CUSTODY" DETERMINATION.

Without this Court's guidance, the state courts that have considered this important issue are in conflict. Of the state courts that have directly addressed the issue of considering a mentally retarded suspect's mental capacity when determining if that suspect was in custody for purposes of *Miranda*, two state courts have held that a suspect's mental capacity should be considered, while two other state courts have held that it should not.

As explained above, the Illinois Supreme Court held below that the reasonable person standard for determining custody under *Miranda* must be modified to take into account the mental capacity of a suspect when that suspect is mentally retarded. App.17-19. In applying that modified reasonable person standard, the Illinois Supreme Court concluded that "a reasonable person with defendant's mental capacity would have believed he or she was in custody. . . ." App. 19. Similarly, the Court of Criminal Appeals of Tennessee has held that one factor courts should consider in determining whether a suspect was in custody for purposes of *Miranda* is "the age and mental capacity of [the] defendant." *State v. Loveday*, C.C.A. No. 100, 1990 Tenn. Crim. App. LEXIS 438, *6 (Tenn. Crim. App., July 5, 1990). In *Loveday*, the court considered the fact that the defendant was mildly mentally retarded in concluding that a reasonable person in the defendant's position would have believed he was in custody and entitled to *Miranda* warnings. *Loveday*, 1990 Tenn. Crim. App. LEXIS 438, *6-*8; *see also State v. Hickam*, 692 P.2d 672, 676 (Or. Ct. App. 1989) (affirming the trial court's finding that the defendant was not in custody for purposes of *Miranda* even when the defendant's mental retardation was considered).

In contrast, the Kansas Supreme Court and the Court of Appeals of North Carolina both reject the incorporation of personal characteristics such as a mentally retarded suspect's mental capacity when applying the objective reasonable person test under *Miranda*. Following its consistent precedent over the years on this precise issue, the Kansas Supreme Court expressly held that "'the proper analysis of whether a person is "in custody" is an *objective* analysis that *ignores* subjective beliefs, personality, and *mental capacity* of the defendant.'" *State v. Washington*, 68 P.3d 134, 148 (Kan. 2003) (emphasis added), *quoting State v. William*, 248 Kan. 389, 405, 807 P.2d 1192, cert. denied

502 U.S. 837 (1991), *citing State v. Fritschen*, 247 Kan. 592, 600-03, 802 P.2d 558 (1990).[1] In applying the objective reasonable person test, the North Carolina court rejected the defendant's argument "that a sixteen-year-old, mentally retarded boy would have believed himself to be in custody. . . ." *State v. Jones*, 570 S.E.2d 128, 134 (N.C. Ct. App. 2002). Observing that the custody inquiry was an objective test, and quoting from this Court's holding in *Stansbury* that "'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation,'" the court held that the defendant was not in custody when he made his statements. *Jones*, 570 S.E.2d at 134 (*quoting Stansbury*, 511 U.S. at 324).

While never directly addressing the issue, several other courts have applied the objective test without considering a mentally retarded defendant's mental capacity and found the defendants not to be in custody. *See People v. Hamilton*, 831 P.2d 1326, 1330 (Colo. 1992) (refusing to modify the objective reasonable person standard for determining custody even though the defendant had an IQ of 45); *DeJesus v. State*, 655 A.2d 1180, 1190-91 (Del. 1995) (applying the objective reasonable person standard, holding that the defendant was not in custody when he gave his statements even though the defendant had a low

---

[1] In explaining that this Court held in *Berkemer v. McCarty*, 468 U.S. 420 (1984), that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation," Professor LaFave cited favorably to the Kansas Supreme Court's decision in *Fritschen*, noting that "[a]ccordingly, it was held in *State v. Fritschen*, 247 Kan. 592, 802 P.2d 558 (1990), the state court must discard that prong of a previously utilized five-factor analysis that looked to the 'nature of the suspect' in assessing whether the suspect had been in 'custody' for *Miranda* purposes." 2 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure*, § 6.6(c), p.526 n.32 (2d ed. 1999).

I.Q.); *Commonwealth v. Wallen*, 619 N.E.2d 365, 366-67 (Mass. App. Ct. 1993) (no *Miranda* warnings were required because the mentally retarded defendant was not in custody; the court did not discuss the defendant's mental capacity when making the custody determination); *People v. Dorsey*, 499 N.Y.S.2d 806, 807 (N.Y. App. Div. 1986) (same); *State v. Stauter*, C.A. Case No. 97 CA 72, 1998 Ohio App. LEXIS 3311, *16-*20 (Ohio Ct. App. July 17, 1998) (same); *see also United States v. Macklin*, 900 F.2d 948, 950-51 (6th Cir.), cert. denied, 498 ~~U.S.~~ 840 (1990) (applying the objective reasonable person standard without modification even though the defendants were mentally retarded).

In short, the state courts are in conflict over whether the objective reasonable person test should be modified to include the consideration of a mentally retarded suspect's mental capacity. In light of the importance of this federal constitutional question, the existing conflict warrants this Court's resolution.

IV. A STANDARD THAT FORCES THE POLICE TO ASSESS A SUSPECT'S MENTAL CAPACITY IN ORDER TO DETERMINE WHETHER THAT SUSPECT WOULD BELIEVE HIMSELF OR HERSELF TO BE IN CUSTODY IS UNWORKABLE AND UNDERMINES THE CLARITY AND PURPOSE OF THE OBJECTIVE *MIRANDA* TEST.

The police will rarely be able to quickly and accurately judge the mental capacity of a suspect and the effect of that suspect's mental capacity on his or her belief regarding whether he or she is in custody for purposes of

Miranda.[2] As this Court "ha[s] stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran v. Burbine*, 475 U.S. 412, 425 (1986), *quoting Berkemer*, 468 U.S. at 430. The rule in *Miranda* has the "important virtue of informing police and prosecutors with specificity as to how a pretrial questioning of a suspect must be conducted" in order for custodial interrogation to result in admissible statements. *Colorado v. Spring*, 479 U.S. 564, 577 n.9 (1987). This Court has recognized the importance of providing a "workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *New York v. Quarles*, 467 U.S. 649, 658 (1984) (*quoting Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

Requiring the police to conduct what amounts to an ad-hoc, on-the-scene psychiatric or IQ exam in order to determine whether a suspect's mental capacity may make him believe he is in custody will eliminate the clarity of the *Miranda* rule. As this Court has observed, "an objective, reasonable-man test is appropriate because, unlike a subjective test, it . . . 'does [not] place upon the police the

---

[2] Dissenting in *Alvarado*, Justice Breyer stated that the suspect's age "is an objective circumstance that was known to the police" and was "not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception." *Alvarado*, 124 S.Ct. at 2155 (Breyer, J., dissenting). Unlike a juvenile suspect's age, a mentally retarded suspect's mental capacity is *not* a widely shared characteristic and *is* a special quality. As this Court noted in *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002), "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for this intellectual function prong of the mental retardation definition." A suspect's mental capacity and its impact on the suspect's beliefs regarding custody will often be difficult to gauge.

burden of anticipating the frailties or idiosyncrasies of every person whom they question.'" *Berkemer*, 468 U.S. at 442 n.35 (citation and quotation omitted). Modifying the objective test to account for the mental capacity of a suspect would require the police to do exactly what this Court explained was inappropriate for the custody determination: it would place upon the police the burden of anticipating the frailties of every person they question. A modification to the objective reasonable person standard that would require the police to assess a suspect's mental capacity and its effect on that suspect's belief regarding custody contradicts the long-established reasoning behind the objective *Miranda* custody test.

The difficulties of implementing a rule that requires the police to assess and consider a suspect's mental capacity are stark. In holding that the mentally retarded could not be executed, this Court declined to set forth a standard by which a person may be classified as mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (in explaining that it would not define who qualified as mentally retarded, this Court stated that "we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences") (quotation and citation omitted). Highlighting the difficulty in defining who qualifies as mentally retarded, this Court observed in *Atkins* that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, *it is in determining which offenders are in fact retarded.*" *Id.* at 317 (emphasis added). State legislatures are in disagreement over how to define who is mentally retarded.[3] If it is difficult for state legislatures to

[3] For example, Kentucky defines a person as mentally retarded for purposes of capital punishment as a person with an IQ below 70 who also displays "substantial" deficits in adaptive behavior. Ky. Rev. Stat. § 532.130-532.140 (1990). In contrast, Arkansas

(continued...)

agree on which offenders are retarded, it will be even more difficult for the police who will have to make that determination quickly on the scene.

A review of the clinical definitions of mental retardation show how difficult and burdensome it will be on the police to require them to assess a suspect's mental capacity for purposes of *Miranda*. At the outset of the opinion in *Atkins*, this Court set forth the following clinical definitions of mental retardation:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of

---

(...continued)
requires an IQ of 65 or below coupled with a "significant" impairment in adaptive behavior. Ark. Code Ann. § 5-4-618 (1993). Other states, such as Indiana, have no minimum IQ standard and list as their sole requirement a "substantial" impairment in adaptive behavior. *See* Ind. Code § 35-36-9-1 (1994) et seq.

> the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 536 U.S. at 308 n.3. While a trained psychiatrist may be able to assess a person's mental capacity under these guidelines after a series of clinical examinations, the police will be unable to do so given the time constraints and lack of psychiatric training. The police do not have the time or the resources to assess on the scene whether a suspect is mentally retarded or to determine what effect that suspect's mental capacity may have on his or her belief regarding custody. More difficult still is assessing the impact of a suspect's mental capacity on that suspect's belief regarding custody when that suspect is merely borderline mentally retarded.

Requiring the police to make a clinical evaluation regarding whether a suspect can be classified as mentally retarded all within moments of contact with that suspect dramatically undermines the clarity and purpose of the objective reasonable person test under *Miranda*. Imposing a requirement that the police assess and consider a suspect's mental capacity and speculate as to how that mental capacity impacts that suspect's individual belief as to whether he or she is in custody transforms the objective *Miranda* test into a subjective one. In order to preserve the

clarity and purpose of the *Miranda* custody inquiry, the test must remain objective without an assessment of a suspect's mental capacity. The Illinois Supreme Court's holding requiring the police to assess a suspect's mental capacity and to consider whether a person with that suspect's mental capacity would believe himself or herself to be in custody raises an important federal constitutional question that conflicts with this Court's prior decisions and decisions of other courts. Accordingly, the resolution of this issue by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the judgment of the Illinois Supreme Court should be vacated and remanded for reconsideration in light of *Yarborough v. Alvarado*, 541 U.S. —, 124 S.Ct. 2140 (2004).

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorney for Petitioner.

Of Counsel:

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois
RENEE GOLDFARB
Counsel of Record
JOHN E. NOWAK
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

App. 1

OPINION MODIFIED ON DENIAL OF REHEARING—4/15/04

ORIGINAL OPINION FILED—12/18/03

Docket No. 95350—Agenda 16—September 2003

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. MARY BRAGGS, Appellee.

JUSTICE RARICK delivered the opinion of the court:

Defendant, Mary Braggs, was charged in the circuit court of Cook County with two counts of first degree murder for the deaths of Connie Hall and Donald Rudolph. After refusing to conduct a hearing on defendant's pending motion to suppress statements, the circuit court determined that defendant was unfit to stand trial due to the severity of her mental retardation. The court thereafter conducted a discharge hearing, found the State's evidence sufficient to establish defendant's guilt beyond a reasonable doubt, and remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years. Defendant appealed.

The appellate court reversed and remanded. *People v. Braggs*, 302 Ill. App. 3d 602 (1998). Holding that the circuit court had erred when it refused to conduct a suppression hearing, the appellate court remanded the cause for a hearing on defendant's motion to suppress. The appellate court also concluded that the evidence was sufficient to establish guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the circuit court conducted a hearing on defendant's motion to suppress, hearing testimony from the investigating detective, a psychiatrist, a clinical psycholo-

gist, and an assistant State's Attorney who had interviewed defendant after she was formally arrested. The court ultimately ruled defendant was not competent to waive her *Miranda* rights, and consequently granted defendant's motion with respect to statements made to the assistant State's Attorney after defendant's arrest. However, the court did not suppress an inculpatory statement defendant allegedly made to detectives shortly before she was formally arrested, concluding that defendant was not then in custody, there was no evidence of police coercion or misconduct, and the statement was, therefore, admissible. The circuit court determined that a new discharge hearing was not necessary and reinstated the original order committing defendant to the Department of Mental Health. Defendant again appealed.

The appellate court reversed and remanded, stating:

> "[W]hen the trial court ruled that Braggs' statements to the police were admissible because she was not in custody and *Miranda* was inapplicable, it was in error. Likewise, the court's ruling that, in the absence of police coercion or the defendant being in custody, the fact that Braggs was mentally handicapped was to be considered only as to the weight to be given her statements and not as to whether those statements were inadmissible, was in error. The court should have considered whether Braggs' statement to the detectives was voluntary in a state-law sense based upon the totality of the circumstances. [Citation.] One of the factors that the court should have considered was whether Braggs' mental retardation deprived her of 'the capacity to understand the meaning and effect of the confession.' [Citation.] This is particularly important in the present case, where the trial court found the defendant was incapable of waiving her rights under *Miranda* due to her diminished mental capacity." 335 Ill. App. 3d 52, 65.

The appellate court remanded the cause for a new hearing on defendant's motion to suppress, directing the circuit court to conduct a new discharge hearing thereafter. 335 Ill. App. 3d at 69. The appellate court observed, "much of the evidence presented at the motion to suppress hearing was unavailable to the court which conducted the 1996 discharge hearing." 335 Ill. App. 3d at 69.

We granted the State's petition for leave to appeal (177 Ill. 2d R. 315), and we now affirm, with modification, the judgment of the appellate court. We begin with a recitation of the evidence adduced at the suppression hearing.

Chicago police detective Edward Winstead testified that he investigated the deaths of Donald Rudolph and Connie Hall. The victims' bodies were both found in a first-floor apartment located on South Prairie Avenue in Chicago on April 28, 1993. Although officers initially thought that Rudolph had been beaten to death, it was later determined that Rudolph died as a result of strangulation. Hall died as a result of multiple stab wounds. During the course of the investigation, Winstead began looking for defendant.

On May 7, 1993, Survilla Cameron contacted Winstead and informed him that defendant lived with her. Cameron represented herself to be defendant's sister and guardian; however, Winstead admitted he never saw any documentation to substantiate Cameron's claim. After Cameron indicated that Winstead could speak with defendant, Winstead transported defendant and Cameron to Area One and questioned her. Prior to questioning, Cameron informed Winstead that defendant was "mentally incompetent." Winstead admitted one could "clearly see that she was mentally deficient." Cameron agreed to help Winstead in his interrogation of defendant, but cautioned him that defendant was "slow." Winstead did not advise defendant of her *Miranda* rights. The interrogation took place in an interview room with another detective present.

Winstead testified he had difficulty communicating with defendant in that "sometimes she wouldn't answer questions," and other times she was "very slow in answering." In Winstead's own words: "She would be very slow in answering. And her sister would then kind of repeat the question or if Mary Braggs seemed to be paying attention to me she would then answer to her sister." If defendant responded, she would generally direct her answers to Cameron, and Cameron would then "tell [Winstead] what [defendant] was saying." However, Winstead testified he could hear defendant as she spoke. During the interrogation, Cameron acted as an intermediary for Winstead. Defendant's answers were responsive to Winstead's questions in the sense that defendant would respond to questions repeated by Cameron and first posed by Winstead.

Winstead summarized the substance of defendant's statements from the hour-long interrogation. According to Winstead, defendant told him that she was in the apartment on South Prairie Avenue when two black males came to the door. Defendant overheard an argument and hid in the closet. When she came Out, defendant saw Hall dead in the bedroom. Defendant said Hall had been stabbed and was wearing white. Defendant said Rudolph was in the front room. He had been hit in the head with a wrench and had been strangled to death. Winstead testified that defendant's description was "very accurate as to how the victims died and where they were found." Following the interrogation, Winstead took defendant and Cameron home.

On the morning of May 9, Winstead again questioned defendant, this time at Cameron's apartment. As in all of the interviews, Cameron was present. Detective James Redmond was also present. Winstead said defendant was still very slow in answering questions, or she might not answer at all, but during this second interrogation, she

at least spoke directly to him most of the time. Winstead testified he went to question defendant, a mere two days after the first interrogation, "to see if [he] could get a little bit more information, if she recalled more about the two black males who came to the door and the argument." Winstead testified that defendant told him one of the men was named Ron and he was a friend of Cleo. Defendant described the other man as a tall black male. Winstead testified that the investigation revealed Ron Thomas was an acquaintance of Cleo and the victims, and when Winstead located him he was with a tall black male named Mike.

Later that same afternoon, Winstead picked up defendant and Cameron and took them to Area One. Winstead spoke to defendant in an interview room. He indicated, as previously, it took defendant a long time to answer questions. "Often times *[sic]* she would put her head down and say 'I don't know.' " Winstead showed defendant photographs of Ron Thomas and Mike. Defendant quickly identified the photograph of Mike as being the tall black male. Winstead said she was at first uncertain of the identity of Ron Thomas, then she positively him. Winstead testified that when he informed defendant the men were at the police station, defendant changed her story. Defendant then said that these were not the two men who came to the apartment and that it was two different men. Defendant reiterated that two men came to the door and she hid in the closet.

Winstead testified that on that same afternoon he took defendant and Cameron to the scene of the murders. Defendant pointed out where the two bodies were found. Winstead testified that her account was consistent with where the bodies were found by the police. Defendant then showed Winstead the closet where she hid. Winstead testified he examined the closet and defendant "couldn't have possibly fit in there." Winstead then took defendant

and Cameron home, having questioned defendant at three different locations over the course of the day.

On May 12, Winstead transported defendant and Cameron to the polygraph unit of the Chicago police department. Although defendant was cooperative, the polygraph examination was inconclusive because defendant did not register enough emotion. Again, defendant was returned to Cameron's apartment. Cameron and defendant subsequently changed residences.

On June 25, 1993, Winstead picked up defendant and Cameron from their new apartment and again took them to Area One for questioning. Prior to the questioning, Winstead informed Cameron that the police were looking at defendant as a potential suspect. Despite the State's representation otherwise, the record is silent as to whether that information was communicated to defendant. Winstead, another detective, defendant, and Cameron were present in the interview room. Winstead advised defendant of her *Miranda* warnings from a standard form without additional explanation. Defendant made no verbal response; she merely nodded her head in an affirmative manner. Although Winstead could not remember her exact words, he recalled that Cameron said something to the effect of: "he's telling you that you don't have to talk to me and that you're not going to be in trouble or something." Defendant nodded her head in agreement and "seemed to understand what her sister was saying." Defendant never verbally indicated that she understood, and she did not sign a waiver form. Indeed, it is unclear to what extent defendant ever responded to, or communicated with Winstead, He acknowledged that Cameron "initially" acted as an "interpreter," and it is obvious from the foregoing testimony that she was still acting in that capacity on June 25, 1993, despite Winstead's suggestion to the contrary: "After a while, after I talked to [defendant] somewhat, I could begin to understand or

she'd answer me or she wouldn't." The record does not indicate whether Winstead's questions to defendant were suggestive or leading, or whether they called for a narrative response.

Although the transcript of the suppression hearing does not reveal the substance of statements defendant made during the June 25 interview, the testimony of another detective from the discharge hearing indicated that defendant said she and Connie Hall were in an apartment together on April 28, 1993, when Donald Rudolph returned. Rudolph was drunk and struck both defendant and Hall. Defendant then knocked Rudolph down and he struck his head. Hall became upset, accusing defendant of killing Rudolph, and defendant then stabbed Hall a number of times in her upper body. Following the hour-long interview, defendant was placed under arrest. An assistant State's Attorney arrived at the police station and again advised defendant of her *Miranda* warnings.

Dr. Philip Pan, a psychiatrist, testified for the defense. On May 16, 1996, Pan diagnosed the defendant as having moderate mental retardation and determined defendant was unfit to stand trial. He noted that four other psychiatrists had reached the same conclusion. In 1996, Pan concluded it was not likely that defendant could be restored to fitness any time in the near future. On August 31, 1999, Pan again evaluated defendant. Dr. Pan testified that defendant was unfit for trial and would not become fit in the future. Pan also rendered his opinion that defendant was incapable of understanding *Miranda* warnings.

By way of explanation, Dr. Pan testified that defendant could give simple answers to questions she understood, but she was not capable of abstract thinking. Although she knew she was born in 1941, defendant told Dr. Pan, in the course of his 1999 interview, that she was 29 years old. Her

thinking was "idiosyncratic," meaning that she was often "not on the same page" as the person questioning her. She would frequently answer questions in a completely irrelevant manner. When asked the meaning of her right to remain silent, she responded that she already had an attorney. When Pan asked her what it meant that anything she said could be used against her in a court of law, she responded, "he know I didn't do those two crimes. That is something I didn't do."

Dr. Linda Wertzel, a clinical psychologist, also testified for the defense. Wertzel had examined defendant in 1994 and testified to her findings. Wertzel concluded that defendant was mentally retarded with an IQ of 54. Wertzel described her observations of defendant at that time:

> "She was flat and passive, kind of emotionally blunted, no affect. She was overweight. She was—her clothing was dirty. Her hygiene was very poor. She was picking at her skin and nails and nose and ears. She was nonspontaneous in her speech."

Defendant could provide only "simple answers to direct questions and really did not provide a narrative of information." She stated her age to be 29. Testing revealed that defendant functioned, mathematically, at a kindergarten level. Defendant was unsure if she had ever gone to school. She could not read or write.

Wertzel administered a test designed to measure a person's ability to express thoughts accurately and coherently and to comprehend what other people say. She determined that defendant could only express herself at a "very simple childish level" and she could not comprehend more than a one-step command. Wertzel said the test involved asking the subject to touch colored shapes in sequence. Wertzel first asked defendant to touch a red square (one-step command), then asked her to touch a red square and a yellow circle in sequence (two-step

command). Defendant could not get beyond the one-step command. Defendant was inconsistent in her ability to identify shapes correctly. She displayed impairment on both motor speed and motor dexterity tests. She could not accurately draw and number the face of a clock.

When asked the meaning of various Miranda warnings, defendant either said she did not know or she offered an irrelevant or inappropriate response. Eventually, defendant became frustrated and the interview was terminated. As a result of her 1994 examination of defendant, Wertzel concluded that defendant was illiterate, mentally retarded, "only minimally able to care for her basic daily needs, her comprehension of her current circumstances was marginal, and she was unable to understand her *Miranda* rights.

Wertzel examined defendant again in October 1999 and concluded she remained unable to understand her *Miranda* warnings. Dr. Wertzel testified that defendant's behavior was "pretty similar" to her first encounter with defendant. Defendant "acted as though she had only been in jail for about a week." She identified Kennedy as president of the United States. Wertzel administered the Peabody Picture Vocabulary Test, in which the subject is shown a pictures and is asked to name activities or pastimes represented therein. Defendant scored the age equivalent of a five-year-old. After her 1999 examination of defendant, Wertzel again concluded it was "highly unlikely" that defendant ever had the ability to comprehend or waive *Miranda* rights.

Wertzel described defendant as "sort of like a child, * * * unsure of what is real and what is imagined, what is an actual memory, what is told to them." Moreover, she stated that defendant does not tolerate stress very well and is "suggestible." Wertzel described more than one instance where she was able to lead defendant in the questioning to get the information desired.

In rebuttal, the State called Assistant State's Attorney Stan Gonsalves. Gonsalves testified he went to Area One on June 25, 1993, to interview defendant. Prior to meeting defendant, detectives told Gonsalves defendant was "a little slow." Gonsalves advised defendant of her *Miranda* warnings. Gonsalves said defendant was "just quiet at that point." Defendant did not respond verbally when she was asked if she understood her rights. Defendant nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings. Cameron was in the room, but did not say anything. Gonsalves testified that defendant was responsive to his questions during the interrogation, but he conceded that communicating with defendant was "difficult" and "slow." The record does not indicate whether Gonsalves' questions to defendant were suggestive or leading, or whether they called for a narrative response.

After hearing testimony in this matter, the circuit court rendered its ruling. The judge's initial statements indicate that he believed the issue in this case was the same as that presented in *People v. Bernasco*, 138 Ill. 2d 349 (1990), cited by defendant. The court perceived the issue as "two fold": whether defendant's statements were obtained free of police coercion, misconduct, or overreaching; and whether "a valid *Miranda* waiver must be knowing and intelligent."

Citing *Colorado v. Connelly*, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986), the circuit court stated that a confession is not rendered involuntary under the federal due process clause without "some police overreaching." In the circuit court's view, there was no evidence suggesting that the police had done anything to coerce the defendant to give a statement. The court ruled that defendant was not in custody until after she had confessed to Winstead; consequently, *Miranda* warnings were not required prior to that time, and any statements she

made before that point were admissible. The circuit court determined that Winstead had "gratuitously offered" defendant *Miranda* warnings on the morning of her arrest, even though the warnings were not required by the attendant circumstances. The court said there was "no dispute" that defendant was mentally handicapped, but ruled "that goes to the weight of those statements, not to whether those statements were admissible."

The court concluded that defendant *was* in custody following her statement to the Winstead and she did not knowingly and intelligently waive her *Miranda* rights. In so ruling, the court relied upon the uncontroverted testimony of Pan and Wertzel, and that of law enforcement personnel who observed defendant's actions and demeanor during periods of interrogation. The court specifically mentioned "the testimony of Winstead about how she acted and [Assistant] State's Attorney Gonsalves that she did not respond verbally [when] given her rights. She merely stood silent."

Based upon the uncontested testimony of the witnesses, the court suppressed the statement defendant made to Assistant State's Attorney Gonsalves following her arrest. The court, however, denied defendant's motion with respect to any statements made *before* defendant was in custody.

On appeal, the State posits a single issue: whether defendant's final "statement" or "confession" to Winstead-which, on the basis of the trial court's ruling, the State assumes was noncustodial-was "constitutionally voluntary because it was given without police coercion"—a second assumption based upon conclusions the trial court drew from undisputed facts. Defendant continues to argue, *inter alia,* that defendant was in custody when she gave the allegedly inculpatory statement to Detective Winstead and that she did not effectively waive her

Miranda rights. The State disputes the former contention, but not the latter.

We begin our analysis by identifying the relevant standard of review and the burden of proof A court of review will accord great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence; however, the court will review *de novo* the ultimate question posed by the legal challenge to a trial court's ruling on a motion to suppress. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001); *People v. Schoening*, 333 Ill. App. 3d 28, 31-32 (2002). Where a defendant challenges the admissibility of his confession through a motion to suppress, the State has the burden of proving the confession was voluntary by a preponderance of the evidence. 725 ILCS 5/114-11(d) (West 2000); *In re G. O.*, 191 Ill. 2d 37, 49. The concept of voluntariness includes proof that the defendant made a knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel. *People v. Reid*, 136 Ill. 2d 27, 54 (1990); *People v. Joya*, 319 Ill. App. 3d 370, 378 (2001).

In this case, the trial court determined that defendant was unable to effectively waive her *Miranda* rights, based upon the unrefuted testimony of the doctors who had examined her and law enforcement personnel who observed her actions and demeanor. Consequently, the trial court granted the defendant's motion to suppress as to statements allegedly made by defendant after she was formally arrested. The court denied defendant's motion with respect to her earlier statement to Winstead only because the court believed she was not 'in custody" for purposes of *Miranda* at that time. Since defendant continues to argue that she *was* in custody when she was interrogated by Winstead at the police station on June 25, 1993, we first address the custodial issue.

The determination of whether a defendant is "in custody" for *Miranda* purposes involves "two discrete inquiries * * *: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394, 116 S. Ct. 457, 465 (1995); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir. 2003). See also *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336, 104 S. Ct. 3138, 3151 (1984) ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). Thus, in determining whether a person is "in custody" for purposes of *Miranda*, a court should first ascertain and examine the circumstances surrounding the interrogation, and then ask if, given those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *People v. Patel*, 313 Ill. App. 3d 601, 604 (2000). With respect to the latter inquiry, the accepted test is what a reasonable person, innocent of any crime, would have thought had he or she been in the defendant's shoes. *People v. Fair*, 159 Ill. 2d 51, 67 (1994), quoting *People v. Wipfler*, 68 Ill. 2d 158, 166 (1977).

When examining the circumstances of interrogation, the following factors have been found relevant in determining whether a statement was made in a custodial setting: the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, and the age, intelligence, and mental makeup of the accused. See *People v. Lucas*, 132 Ill. 2d 399, 417 (1989); *People v. Fletcher*, 328 Ill. App. 3d 1062, 1073 (2002); *People v. Armstrong*, 318 Ill. App. 3d 607, 613 (2000); *Patel*, 313 Ill. App. 3d at 604-05; *People v. Rivera*, 304 Ill. App. 3d 124, 128 (1999); *People v. Savory*,

105 Ill. App. 3d 1023, 1028 (1982). Although it is generally irrelevant that the interrogating officer subjectively viewed the individual under questioning as a suspect, the officer's beliefs, if conveyed by word or deed to the individual being questioned, *are* relevant to the extent that they would affect how a reasonable person in the position of the individual being questioned would have gauged the breadth of his freedom of action. *Stansbury v. California*, 511 U.S. 318, 324, 128 L. Ed. 2d 293, 299, 114 S. Ct. 1526, 1529 (1994); *Patel*, 313 Ill. App. 3d at 604. Moreover, where the investigating officer is aware of particular characteristics or traits of the individual that make him or her particularly vulnerable to the impression that he or she is in custody, and the officer exploits those characteristics in questioning, that, too, is a relevant factor in determining whether the individual is "in custody" for purposes of *Miranda*. See *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (limited capacity to understand, and other particular personality traits, may be relevant to custody question where officers are aware of those traits and they influence the actions of the officers); *cf United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1999) (no indication that the police were aware of defendants' mental deficiencies and the officers repeatedly advised defendants that they were not under arrest and did not have to answer questions).

As we consider the age, intelligence, and mental makeup of the accused-and an investigating officer's awareness and exploitation of those characteristics-in our examination of the circumstances surrounding the interrogation, so those factors are analytically intertwined with the reasonable-person prong of the custodial question. Indeed, other courts have incorporated these factors into the reasonable-person standard in varied circumstances involving investigatory interaction between the police and citizens. See *United States v. Zapata*, 997 F.2d 751,

759 (10th Cir. 1993) (notwithstanding reasonable-person standard, attributes such as age, education and intelligence of the accused have been recognized as relevant in determining whether consent was voluntary); *United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994) (in applying the reasonable person standard to a consent to search issue, the "particular personal traits * * * of the defendant" may become relevant * * * if the police officer knows of the personal traits or characteristics and they influence his or her conduct); *Commonwealth v. Reid*, 571 Pa. 1, 28, 811 A.2d 530, 546 (2002) (when considering whether consent was voluntarily given, a "reviewing court should evaluate the characteristics of the accused, the interaction between the accused and the police, and assess how a reasonable person in the accused's shoes would have reacted to that interaction"); *United States v. Montgomery*, 14 F.3d 1189, 1194 (7th Cir. 1994) (even when examining a noncustodial interrogation, a court should look to "the characteristics of the accused and the details of the interrogation" to determine whether a reasonable person would have felt coerced); *United States v. Cichon*, 48 F.3d 269, 276 (7th Cir. 1995) (same); *United States v. Oliver*, 142 F. Supp. 2d 1047, 1051 (N.D. Ill. 2001) (same).

The justification for incorporating general and readily discernible characteristics of the subject-actor into the reasonable-person standard logically must apply in this situation as well. If, as is the case, we are concerned with what a reasonable person "in the defendant's shoes" (see *Lucas*, 132 Ill. 2d at 418) would have thought about his or her freedom of action, the reasonable person we envision must at least wear comparable footwear; otherwise, we ought to simply abandon the legal charade that the defendant's characteristics, perspective and perception matter at all.

Recognizing this principle, the Ninth Circuit Court of Appeals has suggested the applicable standard should

indeed be modified in this context, where a juvenile is concerned, to reflect what a reasonable juvenile would have thought in defendant's position. *Alvarado v. Hickman,* 316 F.3d 841, 848 (9th Cir. 2002), *cert. granted,*___ U.S. ___ 156 L. Ed. 2d 703, 124 S. Ct. 45 (2003). In its analysis, the *Alvarado* court first recited the now firmly established legal principle that "juvenile defendants are, in general, more susceptible to police coercion than adults; as such, due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation." *Alvarado*, 316 F.3d at 843. The *Alvarado* court then reasoned, "If a juvenile is more susceptible to police coercion during a custodial interrogation, then the same juvenile is also more susceptible to the impression that he is, in fact, in custody in the first instance." *Alvarado*, 316 F.3d at 843. Next, the court seemingly sanctioned a reasonable-juvenile standard to be applied to the determination of custodial interrogation. The *Alvarado* court quoted, with special emphasis, from *Erving L.*, 147 F.3d at 1248:

> "'Given these facts, *a reasonable juvenile* in E.L.'s position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest.'" (Emphasis in *original.) Alvarado*, 316 F.3d at 848, quoting *Erving L.*, 147 F.3d at 1248.

The *Alvarado* court then observed, "When we survey the landscape of state court decisions, we note that every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the 'in custody' determination, either as a factor in the totality of circumstances test, or by way of *modification to the reasonable person standard*" (Emphasis added.) *Alvarado*, 316 F.3d at 850 n.5 (collecting cases). See generally *State v. Jason L.*, 129 N.M. 119, 126, 2 P.3d 856, 863 (2000) (characteris-

tics such as whether the person being questioned is a child or an adult are objective and relevant to the question of whether a reasonable person would feel free to terminate questioning and leave); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to determine whether defendant would have believed he was in custody at the time of the interrogation); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996) ("it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status"); *In re D.A.R.*, 73 S.W.3d 505, 511 (Tex. Ct. App. 2002) ("We believe the facts here establish that a reasonable thirteen-year-old would have believed he was in custody"); *In re Loredo*, 125 Or. App. 390, 394, 865 P.2d 1312, 1315 (1993) (custodial question entailed inquiry into what a reasonable person of the child's age, knowledge and experience would have thought); *In re Robert H.*, 194 A.D.2d 790, 791, 599 N.Y.S.2d 621, 623 (1993) ("[A] reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene"); *In re Rennette B.*, 281 A.D.2d 78, 85, 723 N.Y.S. 31, 37 (2001) (same). In this context, our own appellate court has modified the reasonable person standard, where a juvenile is involved, considering what a reasonable juvenile would have thought about his or her custodial status. See *In re J.W.*, 274 Ill. App. 3d 951, 960 (1995) ("Although J.W. had not been formally arrested * * * a reasonable 14-year-old person would have been entitled to believe * * * he was in police custody and not free to leave"). See also *People v. Armstrong*, 318 Ill. App. 3d 607, 614-15.

The same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned. "Mental retardation may have a significant impact on an individual who finds himself involved with the

criminal justice system, particularly in the context of confessions and interrogations. * * * Many mentally retarded people may be less likely to withstand police coercion or pressure due to their limited communication skills, their predisposition to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive." L. Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 Ala. L. Rev. 911, 917 (2001). See also P. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1473 (1995) ("Mentally retarded persons are more susceptible to coercion, more likely to confess falsely, and less likely to understand their rights than people of normal intellectual ability"). Just as they are more susceptible to police coercion during a custodial interrogation, the mentally retarded are also more susceptible to the impression that they are, in fact, in custody in the first instance. The circumstances of the instant case amply demonstrate the point.

Including the initial interrogation of June 25, 1993, defendant was questioned by police six times before she was formally arrested: four times at a police facility, once at her home and once at the scene of the crime. The police enlisted the aid and consent of Cameron-who apparently represented herself to be defendant's sister and legal guardian-in order to question defendant. Cameron acted as a translator of sorts and actually facilitated the police interrogation. Her role in the process of interrogation is not what we characterize as that of a family member concerned with defendant's welfare. It is not evident from the record that defendant ever verbally assented to police interrogation. On every occasion that she was questioned outside her home, the police transported defendant. Two detectives were always present during the interrogations.

Although it is not clear from the record whether defendant was present when Winstead advised Cameron that defendant was a suspect, even a mentally retarded suspect might well have regarded herself as such after Winstead had expressed disbelief of her version of events and had asked her to take a polygraph examination. We also note that Winstead for the first time read defendant her *Miranda* rights on June 25, something he had not done in previous encounters. We have no doubt whatsoever that a reasonable person with defendant's mental capacity would have believed he or she was in custody and not free to leave the police station.

In fact, our research has disclosed a case involving similar circumstances, a person of apparently *normal* intelligence, and a determination that the interrogation *was* custodial. In *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985), defendant was questioned by law enforcement officials on four occasions, three on the day of his confession. On the first three, he was transported from his residence to a Bureau of Indian Affairs office by plain clothes agents. When he was picked up the last time for further questioning, Wauneka was transported by two armed officers and was placed in a large conference room with four or five officers who each had an opportunity to question him. The hour-long interrogation eventually turned accusatory. During a break, Wauneka, who was then 18 years old, broke down crying. FBI agents resumed the questioning despite the fact that Wauneka was visibly shaken by this ordeal and eventually obtained a confession. Wauneka had no means of transportation, and he was never offered an opportunity to leave the Bureau's office prior to his confession. On these facts, the court of appeals upheld a district court ruling that Wauneka was "in custody" for purposes of *Miranda* when he confessed. The court stated, "A reasonable innocent person in such circumstances probably would have concluded that

he was not free to leave." *United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985).

Like Wauneka, the defendant in this case was repeatedly taken by officers to a law enforcement facility and questioned. As in *Wauneka*, the instant defendant was never told she could leave the station when she wished; she was taken home by the police when they were finished with her. By the time of the encounter on June 25, the atmosphere of the interrogation had turned accusatory: defendant had taken a polygraph examination and had been designated a suspect by Winstead. However, defendant, unlike *Wauneka*, is mentally retarded. She was only at the police station because her purported guardian/sister agreed to police requests that she accompany them there. Her options, no doubt, seemed very limited indeed.

Under the circumstances, a reasonable person with defendant's mental capacity would not have felt free to leave. In this case, the police knowingly exploited defendant's mental retardation. While the custody inquiry may not "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question" *(Berkemer*, 468 U.S. at 442 n.35, 82 L. Ed. 2d at 336 n.35, 104 S. Ct. at 3151 n.35), neither does it sanction the exploitation of known frailties or idiosyncracies by the government. Modification or refinement of the reasonable person standard is appropriate where, as here, such exploitation has occurred. We conclude that the circuit court erred in ruling defendant. was not in custody when she allegedly gave an inculpatory statement to Detective Winstead on June 25, 1993.

Having determined that Winstead's interrogation of defendant on June 25 was custodial, we now address the question of whether defendant knowingly and intelligently waived her *Miranda* rights. Custodial interrogation is, of course, inherently coercive and "'trades on the weakness

of individuals.'" *Dickerson v. United States*, 530 U.S. 428, 435, 147 L. Ed. 2d 405, 414, 120 S. Ct. 2326, 2331 (2000), quoting *Miranda v. Arizona*, 384 U.S. 436, 455, 16 L. Ed. 2d 694, 712, 86 S. Ct. 1602, 1618 (1966). As we have noted previously herein, it is generally recognized that the mentally retarded are considered more susceptible to police coercion or pressure than people of normal intellectual ability, they are predisposed to answer questions so as to please the questioner rather than to answer accurately, they are more likely to confess to crimes they did not commit, they tend to be submissive, and they are less likely to understand their rights. See M. McCloud, *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 503, 538 (2002); L. Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 Ala. L. Rev. 911, 917 (2001). P. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1473 (1995).

However, evidence of a defendant's limited mental or intellectual capacity at the time of a confession, alone, does not establish that he or she was incapable of waiving *Miranda* rights. Limited intellectual capacity is one of several factors to be considered in this regard. *People v. Foster*, 168 Ill. 2d 465, 476 (1995); *People v. Mahaffey*, 165 Ill. 2d 445, 462 (1995).

Nevertheless, "waiver of a constitutional right is valid only if it is clearly established that there was 'an intentional relinquishment or abandonment of a known right * * *.'" *People v. Johnson*, 75 Ill. 2d 180, 187 (1979), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L Ed. 1461, 1466, 58 S. Ct. 1019, 1023 (1938). See *People v. McClanahan*, 191 Ill. 2d 127, 137 (2000). Waivers must not only be voluntary, but must be knowing and intelli-

gent acts in the sense that they are done with sufficient awareness of the relevant circumstances and likely consequences. *McClanahan*, 191 Ill. 2d at 137; *Bernasco*, 138 Ill. 2d at 364-65.

A valid waiver of *Miranda* rights must be knowingly and intelligently made. *Bernasco*, 138 Ill. 2d at 364-65. A criminal suspect is not required to know and understand every possible consequence of a waiver of the *Fifth Amendment* privilege for it to be knowingly and intelligently made. *Colorado v. Spring*, 479 U.S. 564, 574, 93 L. Ed. 2d.954, 966, 107 S. Ct. 851, 857 (1987). However, in order to effect an intelligent and knowing waiver of *Miranda* rights, a defendant must have"'"a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."'"Bernasco, 138 Ill. 2d at 360, quoting *Patterson v. Illinois*, 487 U.S. 285, 292, 101 L. Ed. 2d 261, 272, 108 S. Ct. 2389, 2395 (1988). The defendant need not understand far-reaching legal and strategic effects of waiving his or her rights or appreciate how widely or deeply an interrogation may probe; however, the defendant must at least understand basically what those rights encompass and minimally what their waiver will entail. *Mahaffey*, 165 Ill. 2d at 462, quoting *Bernasco*, 138 Ill. 2d at 363. Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. at 464, 82 L. Ed. at 1466, 58 S. Ct. at 1023; *In re J.J.C.*, 294 Ill. App. 3d 227, 233 (1998).

It is all too obvious, as the trial court concluded, that the defendant in this case did not knowingly and intelligently waive her *Miranda* rights. The State does not even attempt to argue that point. Winstead advised defendant of her *Miranda* warnings from a standard form without additional explanation. Defendant made no verbal response; she merely nodded her head in an affirmative manner.

Winstead later recalled that Cameron told defendant something to the effect of: "He's telling you that you don't have to talk to me and that you're not going to be in trouble or something." Defendant nodded her head in agreement and "seemed to understand what her sister was saying." Defendant never verbally indicated that she understood, and she did not sign a waiver form. Indeed, it is unclear to what extent defendant ever responded to, or communicated with, Winstead. He acknowledged that Cameron "initially" acted as an "interpreter," and it is obvious from his testimony that she was still acting in that capacity on June 25, 1993, despite Winstead's suggestion to the contrary: "After a while, after I talked to [defendant] somewhat, I could begin to understand or she'd answer me or she wouldn't." That statement is hardly a testament to an acceptable level of communication and understanding between Winstead and defendant. The record does not indicate whether Winstead's questions to defendant were suggestive or leading, or whether they called for a narrative response.

Assistant State's Attorney Gonsalves testified that he advised defendant of her *Miranda* warnings, and she was "just quiet at that point." Defendant did not respond verbally when she was asked if she understood her rights. Defendant simply nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings. Cameron was in the room, but did not say anything. Gonsalves testified that defendant was responsive to his questions during the interrogation, but he conceded that communicating with defendant was "difficult" and "slow." The record does not indicate whether Gonsalves' questions to defendant were suggestive or leading, or whether they called for a narrative response. It does not appear from the record that defendant had any prior experience with the criminal justice system.

Dr. Philip Pan characterized defendant's mental impairment as moderate mental retardation. He determined her condition was profound to a degree that she was unfit to stand trial. He noted that four other psychiatrists had reached the same conclusion. Pan rendered his opinion that defendant was incapable of understanding *Miranda* warnings. He noted that her thinking was "idiosyncratic," meaning she was often "not on the same page" as the person questioning her. She would frequently answer questions in a completely irrelevant manner.

Dr. Linda Wertzel, a clinical psychologist, examined defendant in 1994 and testified to her findings. Wertzel concluded that defendant was mentally retarded with an IQ of 54. Wertzel stated that defendant could provide only "simple answers to direct questions and really did not provide a narrative of information." Defendant functioned, mathematically, at a kindergarten level. Defendant was unsure if she F had ever gone to school. She could not read or write. Wertzel determined that defendant could only express herself at a "very simple childish level" and she could not comprehend more than a one-step command. Defendant's comprehension of her circumstances was marginal, and she was unable to understand her *Miranda* rights.

Wertzel examined defendant again in October of 1999 and concluded defendant remained unable to understand her *Miranda* warnings. Wertzel then administered the Peabody Picture Vocabulary Test to defendant. Defendant scored the age equivalent of a five-year-old. After her 1999 examination of defendant, Wertzel determined it was "highly unlikely" that defendant ever had the ability to comprehend or waive *Miranda* rights. Wertzel described defendant as "sort of like a child, * * * unsure of what is real and what is imagined, what is an actual memory, what is told to them." Moreover, she stated that defendant does not tolerate stress very well and is "suggestible."

Wertzel described more than one instance where she was able to lead defendant in the questioning to get the response desired.

The uncontroverted testimony in this case demonstrates that defendant did not knowingly and intelligently waive her *Miranda* rights. No other conclusion is possible based on the evidence adduced at the suppression hearing. Defendant was subjected to repeated interrogation that was actually *facilitated* by her purported sister/guardian. By repeatedly taking defendant where they wanted, when they wanted, the police reinforced their authority and control over her. Defendant apparently had no prior experience with the criminal justice system. She was clearly a suspect by the time she took a polygraph test and was thereafter questioned on June 25, 1993. The experts who testified were unanimously of the opinion that defendant was incapable of understanding and waiving her *Miranda* rights. Aside F from the State's testimony regarding defendant's ambiguous nods, there was no evidence even suggesting that defendant waived her rights. In fact, the minimal level of communication between law enforcement officials and the defendant throughout the investigation of this case is a matter of great concern to this court and should have been to the officers involved, who proceeded to repeatedly question defendant despite her obvious impairment and vulnerability. We note that the degree of defendant's mental impairment is comparable to that of the defendants in *Bernasco* and *People v. Robinson*, 301 Ill. App. 3d 634 (1998). In both cases, confessions were suppressed. *Bernasco*, 138 Ill. 2d at 350-51; *Robinson*, 301 Ill. App. 3d at 643.

It has been said that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v.*

Illinois, 378 U.S. 478, 488-89, 12 L. Ed. 2d 977, 985, 84 S. Ct. 1758, 1764 (1964). Custodial interrogation trades on the weakness of individuals (*Dickerson*, 530 U.S. at 435, 147 L. Ed. 2d at 414, 120 S.Ct. at 2331, quoting *Miranda*, 384 U.S. at 455, 16 L. Ed. 2d at 712, 86 S. Ct. at 1618); the young and mentally infirm are most vulnerable. The potential for abuse is obvious, as is the need for adequate safeguards. We believe this case amply demonstrates the point.

Both confessions defendant allegedly gave on June 25, 1993, were made under circumstances custodial in nature. As defendant was incapable of knowingly and intelligently waiving her *Miranda* rights, both statements should have been suppressed. We express no opinion regarding the admissibility of statements defendant may have made prior to that date. The State's argument on appeal concerns only defendant's "confession to the detectives." We, therefore, affirm the judgment of the appellate court insofar as we reverse and remand for further suppression proceedings and a new discharge hearing. We modify the appellate court's judgment to the extent that we limit the scope of any further suppression proceedings to statements defendant may have made prior to June 25, 1993.

Given our disposition, we need not reach the issue upon which the appellate court disposed of this case. We may affirm the result below on any basis that is supported by the record. *People v. Huff*, 195 Ill. 2d 87, 91 (2001); *In re Application of the Cook County Treasurer*, 185 Ill. 2d 428, 436 (1998).

For the reasons stated, we affirm the judgment of the appellate court as modified and remand to the circuit court for further proceedings consistent with this opinion.

Affirmed as modified;
cause remanded

FIFTH DIVISION
November 8, 2002

No. 1-01-0110

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County
v.	)	
MARY BRAGGS, Defendant-Appellant.	)	Honorable Stanley Sacks, Judge Presiding.

JUSTICE QUINN delivered the opinion of the court:

Defendant, Mary Braggs, was charged by indictment with two counts of first degree murder for the deaths of Connie Hall and Donald Rudolph. The initial trial court refused to conduct a hearing on defendant's motion to suppress statements. The trial court subsequently found defendant unfit to stand trial and a discharge hearing was held. At that hearing, the trial court found that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt and remanded defendant to the Department of Mental Health and Development Disabilities (Department of Mental Health) for a period of five years.

On appeal, this court held that the trial court erred when it refused to conduct a hearing on defendant's motion to suppress and directed the trial court to conduct a hearing on remand. *People v. Braggs*, 302 Ill. App. 3d 602 (1998). This court additionally held that the evidence was sufficient

to establish guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the trial court conducted a hearing on defendant's motion to suppress and, in finding that defendant was not mentally competent to waive her *Miranda* rights, granted defendant's motion with respect to the statements made to the assistant State's Attorney following defendant's arrest. The trial court did not suppress defendant's statement made to detectives shortly after she arrived at the police station. The trial court held that a new discharge hearing was not necessary and reinstated the original order committing defendant to the Department of Mental Health. Defendant now appeals.

On appeal, defendant argues that the trial court improperly denied her motion to suppress in that her statements were not voluntary. Defendant additionally argues that the trial court erred in refusing to hold a new discharge hearing.

For the following reasons, we reverse and remand.

I. BACKGROUND

On July 23, 1993, defendant was indicted on two counts of first degree murder. On June 20, 1996, the initial trial court, after refusing to conduct a hearing on defendant's motion to suppress statements, found defendant unfit to stand trial. The trial court found that defendant, in all probability, would remain unfit indefinitely in light of her mental retardation. The trial court subsequently held a discharge hearing pursuant to Section 104-25 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-25 (West 1996)). At that hearing, a Chicago police detective testified that on July 25, 1993, after he advised defendant of her *Miranda* warnings, defendant told him that she and Connie Hall were in an apartment together on April 28, 1993, when

Donald Rudolph returned. Rudolph was drunk and struck both defendant and Hall. Defendant then knocked Rudolph down and he struck his head. Hall became upset, accusing defendant of killing Rudolph, and defendant then stabbed Hall a number of times in her upper body. The trial court found this evidence sufficient to establish defendant's guilt beyond a reasonable doubt. Defendant was remanded to the Department of Mental Health for a period of five years.

Defendant appealed. On appeal, we remanded the matter for a hearing on defendant's motion to suppress, holding that the trial court erred in refusing to conduct the hearing. *Braggs*, 302 Ill. App. 3d at 606. We also held that the evidence introduced against defendant, when viewed in its aspect most favorable to the State, was sufficient to establish her guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the following evidence was introduced at the hearing on the motion to suppress statements. Chicago police detective Edward Winstead testified that he was assigned to investigate the deaths of Donald Rudolph and Connie Hall. The victims' bodies were both found in a first-floor apartment located on South Prairie Avenue in Chicago on April 28, 1993. Hall died as a result of multiple stab wounds. Rudolph died as a result of strangulation. During the course of the investigation, Winstead began looking for defendant. On May 7, 1993, Survilla Cameron, defendant's sister and guardian, contacted Winstead and informed him that defendant lived with her. Winstead transported defendant and Cameron to Area One and questioned her. Cameron informed Winstead that defendant was mentally incompetent. Defendant was not advised of her *Miranda* rights. Winstead testified he had difficulty communicating with defendant, that "sometimes she wouldn't answer" questions, and that she was "very slow in answering."

Winstead testified that, in summary, defendant told him that she was in the apartment when two black males came to the door. Defendant heard an argument and hid in the closet. When she came out, defendant saw Hall dead in the bedroom. Defendant said Hall had been stabbed and was wearing white. Defendant said Rudolph was in the front room and that he had been hit in the head with a wrench and had been strangled to death. Winstead testified that defendant's description was "very accurate as to how the victims died and where they were found." Winstead then took defendant and Cameron home.

On the morning of May 9, Winstead questioned defendant at Cameron's apartment with Cameron present. Defendant said that one of the men was named Ron and that he was a friend of Cleo's. Defendant described the other man as a tall black male. Winstead testified that the investigation revealed Ron Thomas was an acquaintance of Cleo and the victims, and when Winstead located him he was with a tall black male named Mike. Later that same afternoon, Winstead picked up defendant and Cameron and took them to Area One. Winstead, in the company of Cameron, showed defendant photographs of Ron Thomas and Mike. Defendant quickly identified the photograph of Mike as being the tall black male. At first she was uncertain of the identity of Ron Thomas, then she was certain it was him. Winstead testified that when he informed defendant the men were at the police station, defendant changed her story. Defendant then said that these were not the two men who came to the apartment and that it was two different men. Defendant said two guys came to the door and she hid in the closet.

Winstead testified that on that same afternoon he took defendant and Cameron to the scene of the crime. Defendant pointed out where the two bodies were found. Winstead testified that her account was consistent with where the bodies were found by the police. Defendant then

pointed out the closet she hid in. Upon examining the closet, Winstead testified that defendant "couldn't have possibly fit in there." Winstead then took defendant and Cameron home.

On May 12 Winstead transported defendant and Cameron to the polygraph unit of the Chicago police department. Although defendant was cooperative, the polygraph examination was inconclusive because defendant did not register enough emotion. Again, defendant was returned to Cameron's apartment. Cameron and defendant subsequently moved residences.

On June 25, 1993, at around noon, Winstead picked up defendant and Cameron from their new apartment and took them to Area One for questioning. Prior to the questioning, Winstead informed Cameron the police were now looking at defendant as a potential suspect. Winstead, another detective, defendant and Cameron were present in the interview room. Winstead advised defendant of her *Miranda* warnings, to which defendant nodded her head in an affirmative manner. Following an hour-long interview, defendant was placed under arrest. An assistant State's Attorney arrived and again advised defendant of her *Miranda* warnings.

Dr. Philip Pan, a psychiatrist, testified for the defense. On May 16, 1996, Pan diagnosed the defendant as having moderate mental retardation and being unfit to stand trial. Pan testified it was not likely she could be restored to fitness any time in the near future. On August 31, 1999, Pan again evaluated defendant. Pan opined that defendant was incapable of understanding *Miranda* warnings. Dr. Pan further testified that defendant could give simple answers to questions she understood but she was not capable of abstract thinking. Dr. Pan explained that this meant defendant was unable to think about the higher meaning something may have. Defendant told Dr.

Pan she was 29 years old when in reality she was 56. Dr. Pan also testified that defendant was unfit for trial and would not become fit in the future.

Dr. Linda Wertzel, a clinical psychologist, also testified for the defense. On May 21, 1994, Wertzel examined defendant and concluded she was mentally retarded with an I.Q. of 54. Wertzel concluded defendant mathematically functioned at a kindergarten level. Wertzel also concluded that defendant was unable to understand her *Miranda* rights. Wertzel examined defendant again in October 1999 and concluded she remained unable to understand her *Miranda* warnings. Dr. Wertzel testified that the defendant was emotionally blunted and passive. She was illiterate and was only able to express herself at a very simple, childish level. Defendant had a limited ability to comprehend more than a one-step command. Defendant was unable to cooperate with her attorney.

In rebuttal, the State called Assistant State's Attorney (ASA) Stan Gonsalves. Gonsalves testified he went to Area One on June 25, 1993, to interview defendant. Prior to meeting defendant, detectives told Gonsalves defendant was a little slow. Gonsalves advised defendant of her *Miranda* warnings. Defendant did not respond verbally when she was asked if she understood her rights individually. Defendant nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings.

Following the hearing, the trial court, in an 11-page finding, first determined that the issue facing the court was two fold: whether defendant's statement was obtained free of coercion or misconduct; and whether defendant's waiver of her *Miranda* rights was "knowing and intelligent." The court found that there was not even a suggestion that the police had done anything to coerce the defendant to give a statement. The trial court also found defendant was not in custody until after she confessed to

Winstead, and therefore, any statements she made before that point were admissible. The trial court found that Winstead "gratuitously offered" defendant her *Miranda* warnings on the morning of her arrest even though the warnings were not needed. The trial court found that defendant was in custody following her statement to the police and that she did not knowingly and intelligently waive her *Miranda* warnings. In doing so, the court relied upon the testimony of Dr. Pan and Dr. Wertzel. The court also relied upon "the testimony of Winstead about how she acted and [Assistant] State's Attorney Gonsalves that she did not respond verbally [when] given her rights. She merely stood silent." The court found that defendant was mentally handicapped and then held "that goes to the weight of those statements, not to whether those statements were admissible." Therefore, the court denied defendant's motion with respect to any statements made before defendant was in custody, but suppressed the statement made to ASA Gonsalves following her arrest.

Defendant's motion to reconsider was denied. The trial court then ruled that the original order of June 27, 1996, committing defendant to the Department of Mental Health, should stand. In recognizing the appellate court's instruction that "in the event that motion [motion to suppress] is granted and the statements of defendant are suppressed, the circuit court shall conduct a new discharge hearing." (*Braggs*, 302 Ill. App. 3d at 607), the trial court held that a new discharge hearing was unnecessary. The testimony at the previous discharge hearing only involved defendant's unsuppressed statement to the police. Defendant's statement to Gonsalves was not introduced at the discharge hearing. Therefore, the trial court reasoned that the evidence would be the same and a new hearing would be unnecessary. Defendant now appeals.

II. ANALYSIS

We review the ultimate question of whether a confession is voluntary *de novo*, but we accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. *In re G.O.*, 191 Ill. 2d 37, 49-50 (2000).

In denying defendant's motion to suppress, the trial court relied upon *Colorado v. Connelly*, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986). In *Connelly*, the defendant approached a uniformed police officer in downtown Denver on August 18, 1983. Connelly told the officer that he had murdered someone and he wanted to talk about it. The officer gave Connelly his *Miranda* rights. Connelly said he understood his rights and he would talk to the officer because his conscience had been bothering him. A detective arrived and he again advised Connelly of his *Miranda* rights. Connelly said he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young girl he had killed in Denver in November 1982. A search of police records revealed that the body of an unknown female had been found in April 1983. Connelly readily agreed to take the police to the scene of the killing. He pointed out the exact location of the murder. The police testified that Connelly appeared to fully understand the nature of his acts and they did not perceive any indication that Connelly was suffering from any kind of mental illness.

When Connelly was interviewed by the public defender the next morning, he appeared to be disoriented. He gave confused answers to questions and said that "voices" had told him to come to Denver and that he had confessed because the voices told him to. Connelly was initially found incompetent to assist in his own defense, but by March 1984, doctors found him competent to stand trial. In a preliminary hearing, defendant moved to suppress all his statements. A psychiatrist testified that defendant was

suffering from chronic schizophrenia and was in a psychotic state at least as of the day before he confessed. The psychiatrist testified that, in his expert opinion, defendant was experiencing "command hallucinations." *Connelly*, 479 U.S. at 161, 93 L.Ed.2d 473, 107 S.Ct. at 519. This condition interfered with his ability to make "free and rational choices." *Connelly*, 479 U.S. at 157, 93 L.Ed.2d 473, 107 S.Ct. at 517. He further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, defendant understood his rights when the police gave them.

The Colorado Supreme Court affirmed the trial court's suppression of the defendant's statements. *People v. Connelley*, 702 P.2d 722 (Colo. 1985). The court found that the admission of the confession in a court of law was sufficient state action to implicate the due process clause of the fourteenth amendment. The court held "the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." *Connelly*, 702 P.2d at 728. As Connelly's initial statement was not the product of a rational intellect and a free will, it was properly suppressed. Further, Connelly's mental condition precluded his ability to make a valid waiver of his constitutional rights. Therefore, his statement made while in custody was also properly suppressed. *Connelly*, 702 P.2d at 729.

The United States Supreme Court first reversed the Colorado Supreme Court's holding that Connelly's confession violated due process.

> "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquires quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of

> inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e.g.*, Fed. Rule Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment. 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' *Lisenba v. California*, 314 U. S. 219, 236, 86 L. Ed. 166, 180, 62 S. Ct. 280, 290] (1941).
>
> We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent's statements, and their admissions into evidence, constitute no violation of that Clause." *Connelly*, 479 U.S. at 166-67, 93 L. Ed. 2d at 484, 107 S. Ct. at 521-22.

The Supreme Court next considered whether Connelly's waiver of his constitutional rights was valid. The State conceded at oral argument that when Connelly was handcuffed, the custody requirement of *Miranda* was satisfied. In reversing the Colorado Supreme Court's suppression of the statements made by Connelly after he was in custody, the Supreme Court held:

> "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. See *United States v. Washington*, 431 U. S. 181, 187, 52 L. Ed. 2d 238, 245, 97 S. Ct. 1814, 1818] (1977); *Miranda*, [348 U. S., at 460, 16 L. Ed. 2d at 715, 86 S. Ct. at 1620]. Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pres-

> sures to confess emanating from sources other than official coercion.' *Oregon v. Elstad*, 470 U. S. 298, 305, 84 L. Ed. 2d 222, 229, 105 S. Ct. 1285, 1290] (1985). The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170, 93 L. Ed. 2d at 486, 107 S. Ct. at 523.

The Supreme Court continued, "Respondent's perception of coercion flowing from the 'voice of God,' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak." *Connelly*, 479 U.S. at 170-71, 93 L. Ed. 2d at 487, 107 S. Ct. at 523-24.

In basing its ruling on *Connelly*, the trial court focused on its penultimate holding: for a confession to be "involuntary" under the due process clause, there must be coercive police activity. In doing so, the trial court did not address *Connelly*'s instruction that inquiries into the state of mind of a criminal defendant who has confessed are to be resolved by state laws governing the admission of evidence: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum." *Connelly*, 479 U.S. at 167, 93 L. Ed. 2d at 484, 107 S. Ct. at 521-22.

The Illinois Supreme Court addressed the admissibility of confessions made by persons with special needs many decades prior to *Connelly* being decided. In *People v. Klyczek*, 307 Ill. 150 (1923), the court considered the admissibility of the confession of a 16-year-old-Polish youth who averred that he did not understand the questions he was asked and that the confession written by the police was never read to him. The court held:

> "The situation in which the plaintiff in error was placed and the circumstances surrounding him at the time were proper to be taken into consideration by the court in determining the competency of the confession, including his youth and inexperience, his character, his intelligence, his strength of intellect, his knowledge or ignorance, and the fact that he was detained in prison and was interrogated by the police officer who held him in custody. *** The question of admissibility is finally whether, considering all the circumstances of this particular case, they were such that the statement of the plaintiff in error might have been induced by their influence to make a false confession." *Klyczek*, 307 Ill. at 154-55.

In *People v. Lambersky*, 410 Ill. 451 (1951), the supreme court considered the admissibility of a murder confession made by a defendant who had resided at the "Dixon State Hospital for mentally deficient persons, having been adjudicated feeble-minded by the circuit court of Cook County about thirteen years prior thereto." *Lambersky*, 410 Ill. at 453. The court held that confessions "involve a waiver of the constitutional right against self-incrimination and an intentional relinquishment of a known right. As an insane person cannot know of his constitutional rights, his confession is regarded as a nullity and cannot be treated as evidence against him. (*People v. Shroyer*, 336 Ill. 324 [(1929)])." *Lambersky*, 410 Ill. at 455.

In *People v. Hester*, 39 Ill. 2d 489 (1968), the court reviewed the admissibility of a murder confession made by a 14 year old whose mental age and abilities would have been approximately those of an 11 year old at the time he confessed. The court held:

> "The general rule is that subnormal mentality does not *ipso facto* make a confession involuntary 'so long as the subnormality has not deprived the person in question

> of the capacity to understand the meaning and effect of the confession. But mental subnormality is a factor to be considered in determining the issues of voluntariness and admissibility, and, where accompanied by other factors indicative of an absence of voluntariness, will require that the confession be excluded.' (Annot., 69 A.L.R. 2d 348, 350; see *State v. Ordog*, 45 N.J. 347, 212 A.2d 370, 377; *People v. Lara*, 62 Cal. Rptr. 586, 601.)" *Hester*, 39 Ill. 2d at 500.

Hester's holding that a nontreating defense psychiatric expert could not give an opinion based upon statements made to him by the accused because of the self-serving nature of the statements was overturned by *People v. Anderson*, 113 Ill. 2d 1, 13 (1986). However, *Hester* has been cited as good law as recently as *People v. Wiley*, No. 86557, slip op. at 9-10 (October 25, 2001).

In *People v. Turner*, 56 Ill. 2d 201 (1973), the court considered the admissibility of a murder confession made by a person who lived at the Polk State School for mentally retarded children from the time he was 8 until he escaped at the age of 18. The court said:

> "This court has long recognized that the mental capacity of a defendant must be taken into consideration in determining whether his actions were voluntary (*People v. Klyczek*, 307 Ill. 150, 155) and while mental deficiency, of itself, does not render a confession involuntary (*People v. Hester*, 39 Ill.2d 489) it is a factor which must be considered in the totality of the circumstances under which the right to counsel was waived *or a statement or confession made*." (Emphasis added.) *Turner*, 56 Ill. 2d at 206.

Turner cites *Hester* for the proposition that "mental deficiency, of itself, does not render a confession involuntary." This leaves out the accompanying phrase, "so long as the subnormality has not deprived the person in ques-

tion of the capacity to understand the meaning and effect of the confession." *People v. Hester*, 39 Ill. 2d at 500. The *Turner* court based its suppression of the defendant's confession on its finding that the defendant did not make an intelligent and knowing waiver of his rights and that defendant told the polygraph examiner that he wanted a lawyer before he confessed. *Turner*, 56 Ill. 2d at 207. Consequently, the fact that the *Turner* court left out the additional language from *Hester* does not indicate that the court disagreed with the proposition that, where mental deficiency deprives a person of the capacity to understand the meaning and effect of his ir her confession, that confession may be involuntary.

In *People v. Simmons*, 60 Ill. 2d 173, 181 (1975), the court cited the above language in *Turner* in reversing and remanding a trial court's denial of a motion to suppress the confession of a 16 year old who was "borderline mentally retarded." The court also held:

> "Whether a statement was voluntarily given must be determined from 'the totality of the circumstances' (*People v. Prim*, 53 Ill.2d 62, 70) and consideration must be given to 'both the characteristics of the accused and the details of the interrogation.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862, 93 S. Ct. 2041, 2047." *Simmons*, 60 Ill. 2d at 179.

The court also held that when considering whether a juvenile's confession is admissible, "'the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.'" *Simmons*, 60 Ill. 2d at 18, quoting *In re Gault*, 387 U.S. 1, 55, 18 L. Ed. 2d 527, 561, 87 S. Ct. 1428, 1458 (1967).

Our supreme court considered this long line of its precedent and the holding in *Connelly* in the seminal case of

People v. Bernasco, 138 Ill. 2d 349 (1990). In *Bernasco*, the defendant was 17 years old and a psychologist testified that he could not understand *Miranda*, warning. The trial court found that "though the confession was not coerced or otherwise the product of improper police conduct, and though the confession was preceded by *Miranda* warnings [citation], defendant's intelligence level was so low that his *Miranda* waiver and his confession were neither voluntary nor knowing." *Bernasco*, 138 Ill. 2d at 351. In analyzing *Connelly*, the court said:

> "*Connelly* merely means that, in general, issues of intelligent knowledge are separate from issues of voluntariness. The *Connelly* opinion was actually addressing (1) an initial confession given under circumstances requiring no *Miranda* warning (hence involving no question of waiver), the voluntariness of the confession being at issue, and (2) subsequent confessions given after *Miranda* warnings, the voluntariness of the *Miranda* waivers being at issue. Thus—in a narrower vein than that in which the opinion's opening sentences might cursorily be read—the Court continued that, in determining whether a confession is voluntary where there has been no official coercion, inquiries into the state of a confessing defendant's mind, when 'divorced from any coercion *** by the State,' are to be resolved by State evidence law rather than by the due process clause of the fourteenth amendment. (*Connelly*, 479 U.S. at 166-67, 93 L. Ed. 2d at 484, 107 S. Ct. at 522.)." (Emphasis omitted.) *Bernasco*, 138 Ill. 2d at 356.

Significantly, the *Bernasco* court said that the State evidence rules to be applied considered the reliability of the statement, a consideration we will address later. *Bernasco*, 138 Ill. 2d at 353. The court addressed Illinois precedent as follows:

"Independently of *Miranda* and its Federal voluntariness principles, Illinois courts have long held that, to be admissible, a confession must be 'voluntary' in a State-law sense and that a defendant's mental ability, familiarity with the English language, age, education, and experiences are among factors to be weighed in determining from the totality of the circumstances *whether a confession* or waiver of rights is 'voluntary' in that sense. (See *People v. Turner*, 56 Ill. 2d at 206; *People v. Hester* (1968), 39 Ill. 2d 489, 497-98; *People v. Cocroft* (1967), 37 Ill. 2d 19, 22; *People v. Earl* (1966), 34 Ill. 2d 11, 15) (Insanity treated as a categorical exception under Illinois law, the confession of an insane person is involuntary *per se*. (*People v. Lambersky* (1951), 410 Ill. 451, 455; *cf.* 33 Vill. L. Rev. at 903-05 (collecting similar State and pre-*Connelly* Federal holdings).)) In their holdings under State law, Illinois courts in effect have treated intelligent knowledge as one component of a confession's overall voluntariness, rather than as an admissibility criterion separate from voluntariness as in *Miranda* waiver law. (See also Ill. Rev. Stat. 1989, ch. 38, par. 114-11 (governing motions to suppress confessions as involuntary).) The line of *Miranda* cases represented by *Burbine*, *Connelly*, *Spring*, and *Patterson* has now seemingly settled, for Federal constitutional purposes, that voluntariness and intelligent knowledge are separate questions; however, *for purposes of our own evidence law they are interrelated*." (Emphasis added.) *Bernasco*, 138 Ill. 2d at 365.

The clear import of the above language is that Illinois courts must consider intelligent knowledge as a component of a confession's overall voluntariness independently of *Miranda*. Consequently, courts must consider whether a statement was made with intelligent knowledge even in those instances where *Miranda* does not apply. This proposition is further supported by other language in

Bernasco: "We now turn to the question whether the manifest weight of the evidence contradicts the trial court's finding that defendant did not waive his *Miranda* rights *or give his confession knowingly and intelligently*." (Emphasis added.) *Bernasco*, 138 Ill. 2d at 367.

Our supreme court addressed the issue of whether a mentally handicapped juvenile's confession was admissible in *In re W.C.*, 167 Ill. 2d 307 (1995). The court stated:

> "For a defendant's confession to be admitted at trial, the State must first prove by a preponderance of the evidence that the defendant validly waived his privilege against self-incrimination and his right to counsel. (See *People v. Reid* (1990), 136 Ill. 2d 27, 56). To be valid, the waiver must reflect an intentional relinquishment or abandonment of a known right or privilege. The accused must possess a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. (See *People v. Bernasco* (1990), 138 Ill. 2d 349, 360 * * *). To waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. The mental state that is necessary to validly waive *Miranda* rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer. See *Bernasco*, 138 Ill. 2d at 360.
>
> Whether a defendant intelligently waived his right to counsel depends, in each case, on the particular facts and circumstances of that case, including the defendant's background, experience, and conduct. (*Bernasco*, 138 Ill. 2d at 368.) The mental capacity of a defendant must be taken into consideration in determining whether a waiver was valid, and while mental

> deficiency, of itself, does not render a statement unintelligent, it is nonetheless a factor which must be considered in the totality of the circumstances under which the right to counsel was waived or a statement or confession given. (See *People v. Turner* (1973), 56 Ill. 2d 201, 206.) The greatest care must be taken to assure that a juvenile's incriminating statement was not the product of ignorance of rights or of adolescent fantasy, fright or despair. See *People v. Prude* (1977), 66 Ill. 2d 470, 476 (citing cases)." *In re W.C.*, 167 Ill. 2d at 327-28.

The *W.C.* court's references to a statement being unintelligent and its holding that the the mental capacity of a defendant is a factor which must be considered "in the totality of the circumstances under which the right to counsel was waived or a statement or confession given" (*In re W.C.*, 167 Ill. 2d at 328) support the proposition that when a mentally handicapped person makes a statement or confession, the court must not only determine whether the defendant voluntarily waived his constitutional rights, the court must also determine whether the confession or statement itself was voluntary.

Consequently, when the trial court ruled that Braggs' statements to the police were admissible because she was not in custody and *Miranda* was inapplicable, it was in error. Likewise, the court's ruling that, in the absence of police coercion or the defendant being in custody, the fact that Braggs was mentally handicapped was to be considered only as to the weight to be given her statements and not as to whether those statements were inadmissible, was in error. The court should have considered whether Braggs' statement to the detectives was voluntary in a State law sense based upon the totality of the circumstances. *People v. Bernasco*, 138 Ill. 2d at 356. One of the factors that the court should have considered was whether Braggs' mental retardation deprived her of "the capacity

to understand the meaning and effect of the confession." *People v. Hester*, 39 Ill. 2d at 500. This is particularly important in the present case, where the trial court found the defendant was incapable of waiving her rights under *Miranda* due to her diminished mental capacity.

As a practical matter, when a court determines that a defendant is capable of knowingly and intelligently waiving his or her constitutional rights, any confession or statement given by that defendant would also probably have been voluntary in that it was made knowingly and intelligently. Conversely, if a person is not capable of waiving his or her rights, his or her mental disability may well deprive him or her of the capacity to understand the meaning and effect of the confession. This is true even in the absence of coercion or police misconduct, such as in the present case. See *In re M.W.*, 314 Ill. App. 3d 64, 71 (2000) (if a *Miranda* waiver is not made intelligently and knowingly, a confession is not voluntary under Illinois law, even though the police satisfied federal constitutional safeguards). Consequently, when a court determines that a defendant is incapable of knowingly and intelligently waiving his or her rights, the court has an additional affirmative duty to determine whether the defendant's statement or confession was given voluntarily.

> "Whether a statement is voluntarily given depends upon the totality of the circumstances. The question must be answered on the facts of each case; no single fact is dispositive. Factors to consider when determining voluntariness include: the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises. *People v. Melock*, 149 Ill. 2d 423, 447-48 (1992); see *People v. Haymer*, 154 Ill. App. 3d 760, 770

(1987) (collecting cases)." *People v. Gilliam*, 172 Ill. 2d 484, 500-01 (1996).

Another factor to consider is the defendant's familiarity with the English language. *People v. Marts*, 266 Ill. App. 3d 531, 539 (1994). Our courts have added additional factors to consider in cases involving juveniles. These same factors are relevant to cases involving defendants who have the mental capacity of children. Perhaps the most important such factor is the presence of a parent or other adult concerned about the defendant's welfare. *People v. Kolakowski*, 319 Ill. App. 3d 200, 213 (2001). The need for close scrutiny of confessions from mentally handicapped persons by all concerned cannot be overstated. In 1967, the Supreme Court addressed its concern in cases involving confessions by juveniles when it held "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. at 55, 18 L. Ed. 2d at 561, 87 S. Ct. at 1458. This heightened concern in reviewing the admissibility of confessions given by juveniles should also be required in reviewing the admissibility of confessions by the mentally handicapped. As previously discussed, our supreme court has expressed these same concerns, including the possibility that such persons may falsely confess, in an unbroken line of cases since at least 1923. See *People v. Klyczek*, 307 Ill. 150.

In June of this year, the Supreme Court held that executions of mentally retarded criminals were "cruel and unusual punishment" prohibited by the eight amendment. *Atkins v. Virginia*, 536 U.S. ___, 153 L. Ed. 2d 335, 122 S. Ct. 2242, (2002). In so holding, the Court said "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at ___,

153 L. Ed. 2d 335 at 348, 122 S. Ct. at 2250. One of the bases espoused by the majority was the "reduced capacity" of mentally retarded offenders. As a result of this reduced capacity, mentally retarded defendants may be less able to give meaningful assistance to their counsel; they make poor witnesses and the possibility of false confessions is enhanced. *Atkins*, 536 U.S. at ___, 153 L. Ed. 2d 335 at 350, 122 S. Ct. at 2251-52.

The Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000) (hereinafter DSM-IV-TR) defines mental retardation as consisting of three features. The essential first feature is a significantly below-average general intellectual functioning as defined by the intelligence quotient (I.Q.). DSM-IV-TR at 41. This is accompanied by significant limitations in adaptive functioning. "Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standard of personal independence expected of someone in this particular age group, sociocultural background, and community setting." DSM-IV-TR at 42. Finally, the onset must occur before the age of 18 years. DSM-IV-TR at 41.

Mental retardation is classified by its degree of severity. The "highest" classification is "mild" mental retardation, and it applies to persons with I.Q. levels of 50 to 55 to approximately 70. DSM-IV-TR at 43. This group constitutes about 85% of those with the disorder. This group used to be referred to as "educable." "By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress." DSM-IV-TR at 43.

The second classification is "moderate" mental retardation, and it applies to persons with I.Q. levels of 35 to 40

to 50 to 55. DSM-IV-TR at 42. This group constitutes about 10% of those with the disorder. This group used to be referred to as "trainable." They are unlikely to progress beyond the second-grade level in academic subjects. DSM-IV-TR at 43. Dr. Pan testified that Braggs belonged in this category.

"Severe" mental retardation applies to person with I.Q. levels of 20 to 25 to 35 to 40. "Profound" mental retardation applies to person with I.Q. levels below 20 to 25. DSM-IV-TR at 42.

Numerous law review articles have recently been written regarding the issues faced by the criminal justice system in dealing with mentally retarded suspects. See M. McCloud, *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495 Spring (2002), 495, (*McCloud*) for a comprehensive listing. In *McCloud*, the authors conducted tests to determine whether mentally retarded persons could understand the *Miranda* warnings. They concluded that, regardless of the level of disability, the mentally retarded subjects did not understand the Miranda warnings. Further, this inability was not lessened by the factors of the person's age, education or prior experience with the criminal justice system, including prior administration of the *Miranda* warnings. 69 U. Chi. L. Rev. at 538.

The authors cited several studies which indicated that mentally retarded suspects are more likely to confess to crimes they did not commit than do suspects of average intelligence. 69 U. Chi. L. Rev. at 503. This is true even in the absence of police overreaching. The authors specifically criticize Colorado v. *Connelly*'s exclusive focus upon governmental coercion. The authors assert that for a confession by a mentally retarded person to be admissible, it should be made knowingly and intelligently, and to determine this, courts must look to the "state of mind," the

intellectual and psychological capacity, of the person. 69 U. Chi. L. Rev. at 586-87. As previously explained in this opinion, for the last 80 years the supreme court of Illinois has required our courts to consider the mental capacity of the defendant as a factor when determining the admissibility of a confession.

Similarly, our supreme court first expressed its concern with the possibility that a person with limited communication skills might falsely confess some 80 years ago. *People v. Klyczek*, 307 Ill. at 155. Clearly, the best evidence to consider in determining whether a confession is false is the credibility of the confession itself. During the discharge hearing in the instant case, Braggs' statement was admitted. In that statement, Braggs said she knocked Rudolph to the floor, where he struck his head. However, Rudolph died of strangulation. When a person of normal intelligence provides false answers to the police, this is considered to be deception and this is treated as evidence of a "consciousness of guilt." *People v. Shaw*, 278 Ill. App. 3d 939, 951 (1996). Based upon our knowledge of the characteristics of the mentally retarded, false answers may well be the result of their desire to provide an answer they believe will please the interviewer.

We note that our legislature has required our courts to consider the reliability of statements made by children or mentally retarded persons before those statements may be admissible as exceptions to the hearsay rule. See 725 ILCS 5/115-10 (West Supp. 2001) (testimony regarding certain out of court statements made by the victim are admissible if: "[(b)](1) [t]he court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and (2) [t]he child or moderately, severely or profoundly mentally retarded person either: (A) testifies at the proceeding; or (B) is unavailable as a witness and there is corroborative evidence of the act

which is the subject of the statement"). Similar language is also used in section 115-10.3, entitled "Hearsay exception regarding elder adults." 725 ILCS 5/115-10.3 (West Supp. 2001). These additional safeguards are required to ensure that certain evidence provided by mentally handicapped and child victims is reliable. These same concerns are present in cases involving confessions by mentally handicapped persons. They are also present in cases involving confessions by children, but that issue is not before us.

Based on all the above reasons, we reverse the order of the trial court denying Braggs' motion to suppress statements. We remand this matter for a new hearing on the motion to suppress. At that hearing, the trial court must consider the reliability of Braggs' statement and whether the statement was made voluntarily. In making this determination, the court must consider all of the factors set out by our supreme court in *People v. Gilliam*, 172 Ill. 2d at 500-01 (and the cases cited herein). The court must also determine whether Braggs' mental retardation deprived her of the capacity to understand the meaning and effect of her confession. After making this determination, the trial court is to conduct a new discharge hearing pursuant to section 104-25 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-25 (West 1996). We note that much of the evidence presented at the motion to suppress hearing was unavailable to the court which conducted the 1996 discharge hearing.

Reversed and remanded with instructions.

CAMPBELL, P.J., and GREIMAN, J., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	NO. 93 CR 16707
v.	)	
MARY BRAGGS	)	

ORDER

This cause coming to be heard for Defendant's Motion to Suppress Statements, said motion being granted in part and denied in part, IT IS HEREBY ORDERED:

That Judge Richard Neville's ruling of June 27, 1996, wherein the defendant was found not not guilty and her treatment period was extended 5 years until June 27, 2001, is hereby reinstated. The defendant is recommitted to DHS, Alton Mental Health Center, for further treatment until June 27, 2001. DHS shall file a status report with the Court every 90 days.

November 17, 2000

s/_____
Stanley Sacks
Judge

ENTERED
HARRIET CONDELEE
NOV 17 2000
CLERK OF CIRCUIT COURT
CRIMINAL DIVISION
JUDGE _____

AURELIA PUCINSKI, CLERK OF THE CIRCUIT
COURT OF COOK COUNTY, ILLINOIS

FIFTH DIVISION
December 28, 1998

No. 1-97-0726

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Circuit Court of) Cook County
Plaintiff-Appellee,	)
v.	) No. 93 CR 16707
MARY BRAGGS,	) Honorable) Richard E. Neville,
Defendant-Appellant.	) Judge Presiding.

PRESIDING JUSTICE HOURIHANE delivered the opinion of the court:

On July 23, 1993, defendant Mary Braggs was indicted on two counts of first degree murder. On June 20, 1996, after refusing to conduct a hearing on a pending motion to suppress statements, the circuit court found that defendant was unfit to stand trial and, in all probability, would remain so indefinitely in light of her untreatable mental retardation. A discharge hearing followed. Therein, the circuit court found that the evidence introduced against defendant was sufficient to establish her guilt of first degree murder beyond a reasonable doubt. The circuit court then remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years.

On appeal, defendant contends that (1) the circuit court erred in refusing to conduct a hearing on her motion to suppress statements and (2) the evidence introduced

against her was not sufficient to establish her guilt of first degree murder beyond a reasonable doubt.

For the reasons that follow, we remand.

BACKGROUND

On June 23, 1994, almost one year after her indictment, defendant was examined by Dr. Roni Seltzberg, a psychiatrist charged with assessing her fitness to stand trial. Based upon that examination, a fitness hearing was scheduled.

Prior to that hearing, defendant, through counsel, filed a motion to suppress all statements she made to various law enforcement officials, both at the time of her arrest and thereafter. Within that motion, defendant alleged that she was interrogated following her arrest on June 23, 1993, during which time she made statements that were not voluntary. According to defendant, although she was duly advised of her constitutional rights upon arrest, she was nevertheless unable to understand their full meaning because of her mental retardation. Defendant also alleged that her statements were obtained through psychological and mental coercion.

Shortly thereafter, the circuit court conducted a fitness hearing. At that hearing, Dr. Seltzberg testified that defendant, although aware of the nature of the charges against her, had a very limited understanding of the roles of the pertinent courtroom personnel and an equally poor understanding of the nature of the proceedings against her. Dr. Seltzberg concluded that, based upon her examination, defendant was not fit to stand trial, but may attain such fitness within one year, depending upon the seriousness of her mental retardation.

Counsel for defendant offered no evidence to the contrary.

The circuit court, after considering the evidence before it, accepted the testimony of Dr. Seltzberg and found defendant unfit to stand trial. In light thereof, the circuit court refused to consider the pending motion to suppress. Counsel for defendant objected, arguing that pursuant to section 104-11 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-11 (West 1994)), the circuit court could hear such a motion in that the presence of defendant was not essential to a fair determination of the issues therein. The circuit court, disagreed, reasoning that defendant could not be unfit for some purposes, yet fit for others.

On May 16, 1996, almost two years later, defendant was examined by Dr. Philip Pan, another psychiatrist.

A hearing regarding the continuing unfitness of defendant was conducted shortly thereafter.

At that hearing, Dr. Pan testified that defendant remained unfit to stand trial in light of her continuing inability to understand the roles of the various courtroom personnel or the nature of the proceedings against her. Dr. Pan also testified that, based upon his examination, defendant would never be restored to the fitness necessary to stand trial because of the untreatable nature of her mental retardation.

No other fitness evidence was presented.

The circuit court then found, based upon the testimony of Dr. Pan, that defendant was still unfit to stand trial, and that she would remain so indefinitely.

A discharge hearing followed.

Therein, the State called Chicago police detective Allen Szudarski. He testified that he discovered the bodies of Connie Hall and Donald Rudolph on April 28, 1993, inside a ransacked first-floor apartment located at 4135 South

Prairie Avenue in Chicago. Hall was lying in a bedroom partially covered by a blanket. She had been stabbed multiple times in her back and side. Rudolph was lying in a hallway nearby. He had an injury to his chest. Both Hall and Rudolph were covered with blood.

Chicago police detective E. Winstead, as stipulated by the parties, testified that he interviewed defendant on May 9, 1993, and was told that Rudolph let Ron Thomas and another, taller black man into his apartment. Defendant was also present in the apartment at that time. Detective Winstead was further told that the taller man began to choke Rudolph, at which time defendant hid herself in a closet.

Detectives from the Chicago police department subsequently located Thomas, who, at the time he was found, was in the company of another, taller black man, Michael Wilburn. Both Thomas and Wilburn were alcoholics, and both denied any wrongdoing.

Defendant was then requestioned by detective Winstead. Detective Winstead stated that defendant then changed her story, claiming that she had previously been mistaken. Hall and Rudolph, defendant now explained, were not murdered by Thomas or anyone that she knew, but rather by two unknown black men who followed her home from the store.

Next, Chicago police detective James Cassidy testified that he interviewed defendant on June 25, 1993, after duly advising her of her constitutional rights. Defendant told him that she and Hall were in the apartment together when Rudolph returned. Rudolph was drunk and became violent, striking both her and Hall. Defendant explained that she then knocked Rudolph to the floor of the living room where he struck his head. Hall, in turn, became upset and accused her of killing Rudolph. According to detective Cassidy, defendant further stated that

Hall was stabbed a number of times in her upper body, and that she held Hall in her arms. Thereafter, defendant returned to the bedroom where she slept until the following morning. Upon waking, she gathered her clothes, which included a pair of white pants she had been wearing the prior evening, and left. Defendant further told detective Cassidy that she later discarded those pants because they no longer fit, not because they were blood-stained.

Also introduced into evidence was a stipulation that Hall died from numerous stab wounds, and that Rudolph died as a result of strangulation.

In her defense, defendant introduced a stipulation that, if called, detective Winstead would testify that he interviewed Arthur Collins, who, in addition to being Hall's uncle was also the last border his niece and Rudolph allowed in their apartment. Collins told detective Winstead that he moved earlier in April 1993 because there was too much activity and too many strangers in the apartment.

The circuit court, after considering the arguments of counsel, found the evidence introduced against defendant sufficient to establish her guilt of first degree murder beyond a reasonable doubt. The circuit court then remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years.

Defendant appealed.

DISCUSSION

I.

Defendant initially contends that the circuit court erred in refusing to conduct a hearing on her motion to suppress statements. According to her, the provisions of section 104-11 of the Code of Criminal Procedure clearly envision a

circuit court conducting such a hearing, notwithstanding a prior finding of unfitness.

Section 104-11 of the Code provides, in pertinent part, as follows:

> "Following a finding of unfitness, *the court may hear and rule on any pretrial motion or motions if the defendant's presence is not essential to a fair determination of the issues.* A motion may be reheard upon a showing that evidence is available which was not available, due to the defendant's unfitness, when the motion was first decided. (Emphasis added.) 725 ILCS 5/104-11(d) (West 1996).

The foregoing provisions address themselves to all pretrial motions generally, which, by definition, includes motions to suppress. 725 ILCS 5/114-11 (West 1996). Accordingly, the circuit court erred in refusing to conduct a hearing on defendant's motion to suppress unless it can be said that the presence of defendant was essential to a fair determination of the issues raised therein.

Here, however, counsel for defendant specifically advised the circuit court, prior to the discharge hearing, that the presence of defendant was not necessary for a fair determination of the issues presented within her motion to suppress. Counsel for defendant also informed the circuit court that Dr. Linda Wetzel, a privately-retained psychologist, had examined defendant and would testify that the latter could not understand the constitutional rights of which she was admittedly advised due to the severity of her mental retardation. The circuit court was further informed that counsel for defendant would introduce evidence he believed would establish mental and psychological coercion in connection with the statements given by his client.

The circuit court declined to conduct a hearing on that motion, reasoning that, as a matter of law, a finding of

unfitness to stand trial necessarily precludes any hearing on a motion to suppress.

A finding of unfitness to stand trial does not necessarily preclude a hearing on a motion to suppress. See *People v. Lavold*, 262 Ill. App. 3d 984, 1003-004, 635 N.E.2d 919 (1994) (McNulty, J., dissenting); *People v. Fuhrman*, 233 Ill. App. 3d 503, 507, 599 N.E.2d 478 (1992); *People v. Burt*, 142 Ill. App. 3d 833, 837, 492 N.E.2d 233 (1986). Indeed, the provisions of section 104-11(d) of the Code expressly and explicitly allow for such a hearing, notwithstanding a prior finding of unfitness, where the presence of the defendant is not essential to a fair determination of the issues raised therein. 725 ILCS 5/104-11(d) (West 1996). As the aforementioned offer of proof established, the presence of defendant was not essential to a fair determination of the issues raised within her motion to suppress. The circuit court therefore erred in refusing to conduct a hearing on that motion.

II.

Defendant next contends that the evidence introduced against her was insufficient to establish her guilt of first degree murder beyond a reasonable doubt.

To the contrary, however, the evidence introduced against defendant, when viewed in its aspect most favorable to the State, was sufficient to establish her guilt beyond a reasonable doubt.

CONCLUSION

For the aforementioned reasons, we remand this matter for a hearing on the motion to suppress statements. In the event that motion is granted and the statements of defendant are suppressed, the circuit court shall conduct

a new discharge hearing at its earliest possible convenience.

Remanded with directions.

HARTMAN and THEIS, JJ., concur.

Supreme Court, U.S.
FILED
DEC 18 2004
OFFICE OF THE CLERK

(3)

No. 04-0126

IN THE

SUPREME COURT OF THE UNITED STATES

The State of Illinois,
Petitioner,
vs.

Mary Braggs,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Edwin A. Burnette,
Public Defender of Cook County
69 WestWashington, 15th. Floor
Chicago, Illinois 60602
(312) 603-0600

Counsel For Respondent

Of Counsel:
Vicki Rogers,
Bruce C. Landrum,
Assistant Public Defenders

QUESTION PRESENTED

Whether a court must consider a defendant's mental capacity when determining whether the defendant was "in custody" for purposes of Miranda v. Arizona?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Brief In Opposition 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provision Involved 2

Statement of the Case 3

Reasons for Denying the Petition 15

I.

PETITIONER'S CHALLENGE TO THE ILLINOIS SUPREME COURT'S DECISION, SUPPRESSING RESPONDENT'S CONFESSIONS (GIVEN ON JUNE 25, 1993)- WHICH THE COURT DETERMINED AS CUSTODIAL IN NATURE–FAILS TO PROVIDE THE REQUISITE CIRCUMSTANCES THAT JUSTIFY THIS COURT'S JURISDICTION UNDER 28 U.S.C. §1257 (1), AS THE ILLINOIS DECISION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS 15

II.

THE ILLINOIS SUPREME COURT'S DECISION SHOULD BE AFFIRMED WHERE IT IS GROUNDED ON ILLINOIS LAW THAT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.....19

Conclusion 26

TABLE OF AUTHORITIES

Cases:

Alvarado v. Hickman, 316 F. 3d. 841 (9th Cir. 2002).....15,16,17,19, 20

Coleman v. Thompson, 501 U.S. 722, 115 L. Ed. 2d. 640, 111 S. Ct. 2546 (1991).....16

Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed. 2d. 789, 65 S.Ct. 459 (1945).....16

Illinois v. Rodriquez, 497 U.S. 177, 111 L. Ed 2d 148, 1101 S. Ct. 2793 (1990).....15,16

In re: J.W., 274 Ill. App. 3d. 951 (1955).....17,21

Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 120, 103 S. Ct. 3469 (1983).....16

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966)..... *passim*

People v. Armstrong, 318 Ill. App. 3d. 607 (2000).....17,21

People v. Braggs, 209 Ill. 2d. 492 (2004)..... *passim*

People v. Lucas, 132 Ill. 2d. 417 (1989).....21

People v. Patel, 313 Ill. App. 3d. 601 (2000).....17

Stansbury v. California, 511 U.S. 318, 128 L.Ed. 2d 293,

114 S.Ct 1526 (1998).....20,22

U.S. v. Wauneka , 770 F. 2d. 1434 (9th Cir. 1985).....23

Yarborough v. Alvarado, 541 U.S. ___, 124 S. Ct. 2140 (2004).....19,24

Statute:

28 U.S.C. §1257 (1).....15,19

Secondary sources:

P. Hourihane Earl Washington's Confessions: Mental Retardation 81 Va. Rev. 1471.....23

BRIEF IN OPPOSITION

Respondent respectfully urges this Court to deny the petition for writ of certiorari to the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 209 Ill. 2d 492 (2004). The opinion of the Illinois Appellate Court, First District is reported at 335 Ill. App. 3d 52, 779 N.E.2d 475 (2002). The November 17, 2000, order of the circuit court denying the respondent's motion to suppress is unreported. The opinion of the Illinois Appellate Court, First District, in the respondent's first direct appeal is reported at 302 Ill. App. 3d 602, 707 N.E.2d 172 (1998).

STATEMENT OF JURISDICTION

The original order and judgment of the Illinois Supreme Court was entered on December 18, 2003. The State filed a petition for rehearing. The Illinois Supreme Court entered its final order and judgment on April 15, 2004,

when it denied the petition for rehearing and modified its opinion upon the denial of the petition. This petition for a writ of certiorari is filed within ninety days of the final order. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (A).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No Person... shall be compelled in any criminal case to be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

Because Mary Braggs is retarded and was unfit for trial, the circuit court declined to hold a hearing on her motion to suppress her statements. (C.L. 15) Based on the statements and other evidence, the court found Ms. Braggs "not guilty" of murder and remanded her to the Department of Mental Health during a discharge hearing. (C.L. 13) The Appellate Court reversed and remanded for a hearing on the motion. (C.L. 21)

At the hearing on remand, the court suggested several times during opening statements that Ms. Bragg's statements would not have to be suppressed if she was not in custody when she made the statements. (A. 8, 9, 11) The court commented, at another point, that it did not think anybody disputed that Ms. Braggs was not fit for trial. (B. 8)

Evidence Offered By the Prosecution

Detective Edward Winstead testified for the

prosecution that on April 28, 1993, Don Rudoph and Connie Hall were found murdered in their apartment at 4135 S. Prairie. (A. 14, 36) In the course of the investigation, he tried to locate and talk to a woman named Mary Braggs. (A. 15) On May 7, 1993, he got a call from a woman named Survilla Cameron. (A. 16) Cameron said Mary lived with her at 4839 S. Michigan. (A. 17, 36) Mary was illiterate and mentally incompentent; and Ms. Cameron was Mary's sister and her guardian. (A. 16, 17, 49) Winstead and Detective Redmond went to the residence and brought the two women to Area 1. (A. 17-18) He questioned Mary Braggs about the homicides for possibly an hour. (A. 18-20) Communicating was very difficult, as Mary was mentally deficient, in his opinion. (A. 19, 38, 43) She sat with her head down. (A. 38, 50) Sometimes she wouldn't answer; or she would be very slow in answering. (A. 19, 38) She wouldn't answer for minutes at a time; and sometimes Ms. Cameron would repeat the

question or act as an interpreter. (A. 19, 49, 51)

Mary often directed her answers to Ms. Cameron or nodded in agreement with what she said. (A. 19, 50) A lot of Mary's responses were, "I don't know" or "I don't recall." (A. 39) Her favorite expression was, "last thing I remember." (A. 39) At the end of the interview, Winstead drove the two women home. (A. 21)

From the interview, Winstead learned, in summary, that Mary was in the apartment. (A. 20) Two male blacks came by the apartment. (A.20) There was an argument and she hid in the closet. (A.20) When she came out, Connie had been stabbed to death in the bedroom while wearing a white nightgown; Don had been hit in the head with a wrench and strangled to death in the front room. (A. 20-21) This was very accurate as to how the victims died and where they were found. (A. 21)

On May 9, 1993, Winstead returned to the women's

residence with Detective Redmond to see if he could get more information or if Mary recalled more about the two male blacks and the argument. He spoke to Mary in the presence of Ms. Cameron for a half hour or so. Mary still did not answer or was very slow in answering but at least most of the time she spoke to him directly and looked at him when she answered questions. (A. 21- 22) She told him one man was named Ron, who was a friend of a man named Cleo, and the other man was tall. (A. 22-23) Winstead had previously interviewed someone named Ron Thomas who was an acquaintance of both Cleo and the victims. (A. 23)

Winstead later picked up Ron Thomas and a tall man named Mike who was with him and brought them to Area 1. They then picked up Ms. Braggs and Ms. Cameron, and brought them to Area 1. (A. 23) Winstead then interviewed Ms. Braggs for the third time, and showed her photos of Ron Thomas and Mike. (A. 25-26) She went back and forth about

Ron Thomas, saying yes it is and no it isn't. (A. 25-26) Winstead told her they were there at Area 1, and that she could see them in person, but she said no, they were not the guys. (A. 25-26)

Winstead then took the women to the crime scene and asked Ms. Braggs to point out the location of the bodies and the closet where she hid. (A. 27) She correctly pointed out the location of the bodies. (A. 27) The closet she pointed out did not appear to have enough room for both her and its contents. (A.27-28) He then took the women home. (A.28)

On May 12, 1993, he arranged for Ms. Braggs to take a lie detector test. (A. 28, 43) She was cooperative but the examiner said she just didn't register enough emotion for the test to work. (A. 28-29)

Winstead later went to the women's residence again on or about June 24, 1993. (A. 29, 46) Somebody told him they had moved but would let them know he wanted to talk

to them again. (A. 29) Ms. Cameron called him the next day. (A. 29) He and his partner went to the new residence and brought the women back to Area 1. (A. 30) Winstead then told Ms. Cameron they were now looking at Ms. Braggs as a potential suspect in the homicides; and read Ms. Braggs the Miranda rights for the first time. (A. 31-33) She nodded her head after each right. (A. 32) After an hour, Ms. Braggs was arrested. (A. 34) Assistant State's Attorney Gonsalves arrived from Felony Review and had another conversation with the women. (A. 34)

Evidence Offered by the Defense

Dr. Philip Pan testified that he's a psychiatrist with Forensic Clinical Services; he examined Mary Braggs on May 16, 1995 and August 31, 1999. (B. 3-4) She was born in 1941. (B.11) She had been mentally retarded since at least early childhood. (B.4, 27) He noted, among other things, that her grooming and hygiene were marginal; her eye contact

was poor; her speech was simple, somewhat childlike and loud; and her affect was flat. (B. 10-11) In 1996, he concluded she was unfit for trial and not likely to be restored to fitness any time in the near future. (B.4) In 1999, Dr. Pan concluded she did not understand Miranda warnings and in June of 1993, she would not have been able to understand the warnings or to make a knowing and intelligent waiver of her rights. (B. 10-14)

Dr. Linda Wetzel testified she's a clinical psychologist; she examined Mary Braggs on May 21, 1994 and October 1, 1999. (B. 32, 32, 50) Mary was born in 1941. (B. 34) She had a full scale IQ of 54. (b. 36) She could not read or write. (B. 35) She was not sure if she had been to school. (B34) She scored the equivalent of a kindergartner and a five-year-old on an arithmetic test and a vocabulary test. (B. 35, 49) She was able to express herself on only a childish level. (B. 36) Her body odor was bad. (B. 45) Her

clothing was unclean. (B.45) In 1994, Dr. Wetzel concluded Mary was illiterate and mentally retarded. (B. 42) She was unable to understand her Miranda rights and unable to cooperate with her attorney in preparing a defense. (B. 42) She would not have understood her Miranda rights in June of 1993. (B. 44) In 1999, Dr. Wetzel concluded Mary's mental status was unchanged; she remained unable to cooperate with her attorney and unable to cooperate with her attorney and unable to understand her Miranda rights; and it was highly unlikely she ever had the ability to comprehend her Miranda rights to waive them. (B.51)

Evidence Offered By The Prosecution In Rebuttal

Assistant State's Attorney Stanley Gonsalves testified on June 25, 1993, he was assigned to Felony Review. (C.7) Around 2:30 p.m. he went to Area 1 and spoke to Detectives Winstead and Cassidy. (C. 7-8) They told him Mary Braggs was in custody for a double homicide they were

investigating. (C. 8) She was a little slow. (C.9) She could not read or write. (C. 16) Her sister, Survilla Cameron was in the interview room with her. (C. 10) Gonsalves entered the room with the detectives. (C. 9-10) He introduced himself and advised Mary of her Miranda rights. (C.11) Mary did not say anything or acknowledge any of the rights. (C. 13, 17) He tried to explain the rights in simple terms. (C. 13, 18) He asked her if she wished to say anything to him and she nodded her head in the affirmative. (C. 14, 18) They spoke for about an hour. (C. 15) Communication was slow and difficult. (C. 15) He did not take a written statement because he determined she was illiterate. (C. 19)

Judgment Of The Trial Court

The trial court reviewed cases cited by both sides and heard arguments by both sides. (D.2-33) The court said the case was probably the most unique he had seen. (D.2) He noted that custody was an issue he had thought of before.

(D.17) He concluded that Ms. Braggs was not in custody until after her statements to Detective Winstead on June 25, 1993. (D. 43) The court commented that in his view "there is no suggestion whatever that the police did anything physically to Mary Braggs, coercive to Mary Braggs, or in any way did anything to her in the normal context of the term...coerced to give a statement." (D.36) The court commented that her undisputed mental handicap "goes to the weight of those statements, not to whether (sic) those statement(s) were admissible." (D. 45) The motion to suppress was denied with respect to statements to the police but granted with respect to statements to the Assistant State's Attorney. (D. 45) A motion to reconsider was argued and denied. (F. 3, G. 4, H. 2-16) The court reasoned Ms. Braggs could not understand Miranda but Miranda was not required because a reasonable person in her position would not think she was in custody or under arrest when she spoke to the

detectives. (H. 15-16) After further discussion, the court decided a new discharge hearing was not required and reinstated the prior order remanding Mary Braggs to the Department of Mental Health for 5 years. ((I. 1-10) The court reasoned that the judge at the initial hearing relied on testimony about the June 25, 1993, conversation between the police officers and Mary Braggs that was not suppressed. (I. 408) Because the judge relied on evidence that was not suppressed, a new hearing was not necessary. (I. 5-8)

In People v. Braggs, 335 Ill. App. 3d 65, 779 N.E.2d 475 (2002), the Appellate Court reversed the trial court's ruling and remanded the case, directing the trial court to conduct a new suppression hearing and to consider the voluntariness of Ms. Braggs' statement under state evidentiary laws. On February 5, 2003, Petition for Leave to Appeal was granted.

The Illinois Supreme Court allowed the State's

petition for leave to appeal. Modifying the objective reasonable person standard for determining custody for purposes of Miranda, the Illinois Supreme Court held that respondent was in custody when she gave her first statement to the police because "a reasonable person with defendant's mental capacity would have believed he or she was in custody and not free to leave the police station." People v Braggs, 209 Ill. 2d 492 (2004) The Illinois Supreme Court reached that conclusion by citing the Ninth Circuit Court of Appeals' decision in Alvarado v. Hickman, 316 F.3d 841, (9th Cir. 2002), along with several Illinois cases. The Illinois Supreme Court affirmed the appellate court's decision to suppress the statements respondent made to the detective prior to her formal arrest. Given the Illinois Supreme Court's disposition of the custody issue, it refused to reach the voluntariness issue which the appellate court had based its decision. People v. Braggs, 209 Ill.2d at 519.

REASONS FOR DENYING THE PETITION

I.

PETITIONER'S CHALLENGE TO THE ILLINOIS SUPREME COURT'S DECISION SUPPRESSING RESPONDENT'S CONFESSIONS (GIVEN ON JUNE 25, 1993) WHICH THE COURT DETERMINED AS CUSTODIAL IN NATURE – FAILS TO PROVIDE THE REQUISITE CIRCUMSTANCES THAT JUSTIFY THIS COURT'S JURISDICTION UNDER 28 U.S.C. §1257(1), AS THE ILLINOIS DECISION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

In formulating its decision in the instant case, the Illinois Supreme Court in People v. Braggs, 209 Ill. 2d 492 (2004) cited Alvarado v. Hickman, 316 F. 3d 841 (9th Cir. 2002). However, it is clear that the decision itself is based on adequate and independent state grounds. As such, it is not subject to jurisdiction by this Court under 28 U.S.C. §1257 (1). Thus, the instant petition should be denied.

The United States Supreme Court will not reverse a state court decision which is clearly based on state law that is both adequate and independent. Illinois v. Rodriquez, 497

U.S. 177, 111 L.Ed. 2d 148, 110 S. Ct. 2793 (1990); Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 120, 103 S. Ct. 3469 (1983). Citing Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed. 2d 789, 65 S. Ct. 459 (1945), the Court in Long, stated that its adherence to the above-stated principle is based in part "on the limitation of our own jurisdiction"– as well as its respect for the independence of state courts. 103 S. Ct at 3476. Neither will the use of federal law "as a guide" to invoke the jurisdiction of the Supreme Court, where the state court indicated clearly and expressly that it is alternatively basing its decision on a bona fide separate, adequate, and independent state law. See Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 120, 103 S. Ct. 3469 (1983); Coleman v. Thompson, 501 U.S. 722, 115 L.Ed. 2d 640, 111 S. Ct. 2546 (1991).

In the case at bar, the Illinois Supreme Court cited Alvarado v. Hickman, 316 F. 3d 841 (9th Cir. 2002) – but

only as an example of how age, intelligence and mental makeup have been incorporated into the reasonable man standard. It then concluded that Illinois courts have already modified the reasonable person standard, where juveniles were involved, citing In re J.W., 274 Ill. App. 3d 951 (1995); People v. Armstrong, 318 Ill. App. 3d 607 (2000); and People v. Patel, 313 Ill. App. 3d 601 (2000). In both J.W., and Armstrong (cases involving juveniles), Illinois courts relied on the defendant's age and concluded that they were in "custody" for purposes of Miranda. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The Illinois court then logically extended the same rationale to the characteristic of mental capacity as well. People v. Braggs, 209 Ill.2d at 510.

Thus, it is clear that the Illinois Supreme Court only cited Alvarado v. Hickman, 316 F. 3d. 841 (9th Cir. 2002), as a guide, as its decision was actually grounded upon adequate

and independent Illinois law. Therefore, jurisdiction by this Court should not be invoked. Accordingly the petition should be denied.

II.

THE ILLINOIS SUPREME COURT'S DECISION SHOULD BE AFFIRMED WHERE IT IS GROUNDED ON ILLINOIS LAW THAT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

If this Court decides to invoke jurisdiction under 28 USC §1257 (a), the Illinois Supreme Court's decision in People v Braggs, 209 Ill. 2d 492 (2004), should be affirmed as it is not antagonistic with decisions of this Court. Petitioner argues that the Illinois decision conflicts with Yarborough v. Alvarado, 541 U.S. __, 124 S. Ct. 2140 (2004), which overruled Alvarado v. Hickman, 316 F. 3d 841 (9 Cir. 2002), a case cited by the Illinois Court. However, the Court's rejection of Alvarado is not fatal to the instant case, as the two cases are clearly distinguishable.

The Ninth Circuit case involved the Court of Appeals reversing the District Court's denial of a Writ of Habeas Corpus. Thus, pursuant to the standard of review set out in the Antiterrorism and Effective Death Penalty Act of 1996,

the Court was limited to determining only the unreasonableness of the state court's application of clearly established state law. The Court then concluded that the Arizona state court's adjudication – which held that Alvarado was not in custody (pursuant to the objective reasonable man standard) for purposes of Miranda – was not an unreasonable application of clearly established law. However, in the case at bar, the Court has no such limitation – as the instant case is derived from a direct appeal.

Moreover, the Braggs decision is properly rooted in Illinois and federal law. In Stansbury v. California, 511 U.S. 318, 128 L. Ed 2d 293, 1145 S. Ct. 1526 (1994), this Court held that the test for determining "custody" for purposes of Miranda, is "whether a reasonable man in the suspect's position would have believed that he was in custody"... 128 L. Ed. 2d at 299 – or as so aptly stated by the Illinois Supreme Court, "a reasonable man in the suspect's shoes."

See People v. Lucas, 132 Ill. 2d 417 (1989). The Illinois Court then determined that age, intelligence, and mental makeup of the accused (along with the officer's awareness and exploitation of these characteristics) should be analytically intertwined with the reasonable person prong of the custodial question. People v Braggs,, 209 Ill. 2d at 482.

The Braggs court then alluded to a litany of Illinois authority which not only adopted the two-pronged analysis used in the federal courts, but actually modified the reasonable person standard (where a juvenile is involved) to reflect what a reasonable juvenile would have thought about his custodial status – citing specifically People v. Armstrong, 318 Ill. App. 3d 607 (2000) and In re J.W., 274 Ill. App. 3d 951 (1995). In both cases, which involved juveniles (J.W. was 14 and Armstrong 15), the Illinois Appellate Court considered the factors as set out in both Illinois and federal law for determining the custody issue. It then relied heavily

on the defendant's ages and concluded that both individuals were "in custody" for purposes of Miranda.

Thus, the Illinois Supreme Court actually followed the holding of Stansbury; it just provided clarity and logical meaning to Stansbury's requirement of determining what a reasonable man would think in the suspect's shoes. As stated by the Court in Braggs :

> If as in this case, we are concerned with what a reasonable person " in the defendant's shoes" would have thought about his or her freedom of action, the reasonable person we envision must at least wear comparable footwear; otherwise we ought to simply abandon the legal charade that the defendant's characteristics, perspective, and perception mattered at all. People v Braggs, 209 Ill.2d at 508.

Therefore, the Braggs court concluded that for a juvenile suspect, the objective reasonable man standard should reflect the thought of a reasonable juvenile. The court then logically extended this principle to incorporate a suspect's mental capacity, as well – where mentally retarded

persons are more susceptible to coercion, more likely to confess falsely, and less likely to understand their rights, than people of normal intelligence. See P. Hourihane, Earl Washington's Confessions: Mental Retardation and the Law of Confessions, 81 Va Rev. 1471, 1473 (1995).

In United States v. Wauneka, 770 F. 2d 1434 (9th Cir. 1985), a case cited by the Braggs court and factually similarly to the instant case (expect that the defendant possessed normal intelligence), the Ninth Circuit found that Wauneka was "in custody" for purposes of Miranda. By the same token, Mary Braggs, who possessed the IQ equivalent to a 5 year-old, and cannot understand Miranda warnings (R.B. 35-42) – clearly is more limited than Wauneka. Thus, the Braggs court's conclusion that under the circumstances, a reasonable person with Braggs' mental capacity would not have felt free to leave is entirely proper under Illinois law and should be affirmed by this Court. To hold otherwise would

be an egregious misapplication of the law and common sense – especially in a case such as this, where the mental retardation of respondent Braggs is so severe and obvious.

In her concurring opinion in Yarborough v. Alvarado, Justice O'Connor stated that she agreed with the majority only because Alvarado was almost 18 -years-old, which made it difficult for officers to ascertain his juvenile status. Clearly such rational would militate in favor of Braggs in the instant case where her mental retardation is obvious and severe. Yarborough v Alvarado, 124 S. Ct. at 2152.

Likewise, Justice Breyer's dissent suggests that a suspect's age should be incorporated into the reasonable man standard. As stated by Justice Breyer, "the reasonable person standard does not require a court to pretend that Alvarado was a 35 year-old." 124 S. Ct. at 2155. Clearly, the only logical way to analyze the reasonable man standard is to incorporate pertinent characteristics (age, and mental

capacity) of the accused – as the Braggs Court did when it considered Mary Bragg's mental retardation in determining that she was in custody for purposes of Miranda.

Petitioner also contends that certiorari is necessary due to a split in various state courts. However, since granting certiorari is discretionary, such action is unwarranted here, where the Braggs decision is firmly rooted in Illinois law. Likewise, Petitioner's last allegation – that such assessment by police is unworkable – is also misplaced because in the instant case, the mental retardation of Mary Braggs (as stated earlier) besides being both obvious and severe, was known to the police detectives.

CONCLUSION

Based on the foregoing reasons, the petition for a writ of certiorari should be denied. In the alternative if certiorari is granted, People v. Braggs should be affirmed.

Respectfully submitted,

Edwin A. Burnette,
Public Defender of Cook County
69 West Washington, 15th. Floor
Chicago, Illinois 60602
(312) 603-0600

Counsel For Respondent

Of Counsel:

Vicki Rogers,
Bruce C. Landrum,
Assistant Public Defenders

(2)

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 04-126

In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

MARY BRAGGS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorney for Petitioner

Of Counsel:

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois

RENEE G. GOLDFARB
Counsel of Record
ALAN J. SPELLBERG
JOHN E. NOWAK
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

Printed by Authority of the State of Illinois (P.O. 41787—53—12-8-04)

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE ILLINOIS SUPREME COURT BASED ITS DECISION SOLELY ON FEDERAL CONSTITUTIONAL LAW AND DID NOT INDICATE CLEARLY AND EXPRESSLY THAT IT WAS RELYING ON ADEQUATE AND INDEPENDENT STATE GROUNDS. 1

II. THE ILLINOIS SUPREME COURT'S USE OF A "MODIFIED" REASONABLE PERSON STANDARD CONFLICTS WITH THIS COURT'S DECISION IN *YARBOROUGH V. ALVARADO* AND THIS COURT'S PRIOR DECISIONS REGARDING CUSTODY FOR PURPOSES OF *MIRANDA*. 5

CONCLUSION 8

TABLE OF AUTHORITIES

PAGE(S)

Cases:

Alvarado v. Hickman,
316 F.3d 841 (9th Cir. 2002) 3

Berkemer v. McCarty,
468 U.S. 420 (1984) 3

Dunaway v. New York,
442 U.S. 200 (1979) 4, 7

In re J.W., 274 Ill. App. 3d 951,
654 N.E.2d 517 (1995) 3, 4, 7

Michigan v. Long,
463 U.S. 1032 (1983) 1, 2

Minnesota v. National Tea Co.,
309 U.S. 551 (1940) 2

Miranda v. Arizona,
384 U.S. 436 (1965) 1

Ohio v. Robinette,
519 U.S. 33 (1996) 1, 4

People v. Armstrong, 318 Ill. App. 3d 607,
743 N.E.2d 215 (2000) 3, 4, 7

People v. Patel,
313 Ill. App. 3d 601, 730 N.E.2d 582 (2000) 3, 4

Stansbury v. California,
511 U.S. 318 (1994) 4, 6, 7

Thompson v. Keohane,
516 U.S. 99, 112 (1995) 2, 3, 4

United States v. Badmus,
325 F.3d 133 (2d Cir. 2003) 3

Yarborough v. Alvarado,
541 U.S. ___, 124 S.Ct. 2140 (2004) 3, 5, 6, 8

Statutes:

28 U.S.C. § 1257(a) 5

ARGUMENT

I. THE ILLINOIS SUPREME COURT BASED ITS DECISION SOLELY ON FEDERAL CONSTITUTIONAL LAW AND DID NOT INDICATE CLEARLY AND EXPRESSLY THAT IT WAS RELYING ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Illinois Supreme Court relied only on federal constitutional law regarding the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1965). Respondent wrongly argues that this Court lacks jurisdiction because the Illinois Supreme Court cited three state appellate court decisions in its opinion. The citation to those three cases in the midst of a discussion of federal constitutional law hardly rises to the level of a plain statement indicating clearly and expressly that the court's decision was alternatively based an adequate and independent state law grounds, as required under *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

As this Court explained in *Long*, "when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040-41; *see also Ohio v. Robinette*, 519 U.S. 33, 37 n.* (1996) (stating that "we again reaffirm the *Long* presumption"). All that a state court needs to do is to "make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result the court has reached." *Long*, 463 U.S. at 1041. Accordingly, "[i]f the state court decision indicates *clearly*

and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, [this Court], of course, will not undertake to review the decision." *Long*, 463 U.S. at 1041 (emphasis added). While this Court has recognized the importance of allowing state courts to interpret their state constitutions freely, "'it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.'" *Long*, 463 U.S. at 1041 (*quoting Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)).

Not only did the Illinois Supreme Court fail to make a plain statement indicating "clearly and expressly" that it was relying on separate, adequate, and independent state grounds, the court failed to refer even once to the state constitution or state law in its opinion. Instead, the court relied on the federal constitution and a myriad of cases from this Court, the federal courts, and courts of other states to support its decision. Pet. App. 13-17.[1] The Illinois Supreme Court framed the issue purely in terms of the federal constitution, specifically describing the issue as follows: "The determination of whether a defendant is 'in custody' for *Miranda* purposes involves 'two discrete inquiries * * *: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" Pet. App. 13 (*quoting Thompson v. Keohane*, 516

[1] Respondent cites to the published version of the Illinois Supreme Court's original decision on December 18, 2003. Opp. at 17, 19, 21. That version, which is at 209 Ill. 2d 492 (2003), is the original decision of the court before its modification upon the denial of rehearing on April 15, 2004. The April 15, 2004 opinion has not yet been released for publication, although it is in the appendix to the petition and is online at 2004 Ill. LEXIS 1013, 1015.

U.S. 99, 112 (1995); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir. 2003); also citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). The court never stated that it also had to determine independently whether the person was "in custody" for purposes of the Illinois constitution or Illinois law.

As the basis for modifying the objective reasonable person standard to include consideration of the mental capacity of the specific defendant, the court relied heavily on *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), *rev'd sub nom. Yarborough v. Alvarado*, 541 U.S. ___, 124 S.Ct. 2140 (2004). Pet. App. 15-17. After a thorough discussion of the Ninth Circuit's reasons for modifying the reasonable person standard to include consideration of the defendant's status as a juvenile, the Illinois Supreme Court then included a string citation to similar decisions from six other states. Pet. App. 16-17. All of those cases also discussed modifying the custody determination for *Miranda* to include consideration of the juvenile defendant's age.

In the absence of anything in the Illinois Supreme Court's opinion close to the clear, plain statement required in *Long*, respondent is left pointing to the court's citation to the following three state appellate court cases: *In re J.W.*, 274 Ill. App. 3d 951, 960, 654 N.E.2d 517 (1995); *People v. Armstrong*, 318 Ill. App. 3d 607, 614-15, 743 N.E.2d 215 (2000); and *People v. Patel*, 313 Ill. App. 3d 601, 730 N.E.2d 582 (2000). Opp. at 17. All three of those cases, however, involved solely federal constitutional issues. None of them were based on separate, adequate, and independent state grounds.

The court's citations to *J.W.* and *Armstrong* appear at the end of a long string citation to cases from six other states that used a modification to the reasonable person custody test similar to that used by the Ninth Circuit in

Alvarado. Pet. App. 17. Significantly, both *J.W.* and *Armstrong* involved issues solely under the federal constitution, specifically whether each defendant was under arrest for purposes of the Fourth Amendment. *J.W.*, 274 Ill. App. 3d at 951, 654 N.E.2d at 521-22; *Armstrong*, 318 Ill. App. 3d at 614-15, 743 N.E.2d at 220-21 (*citing Dunaway v. New York*, 442 U.S. 200 (1979); *J.W.*, 274 Ill. App. 3d at 952-53, 956, 960-62, 654 N.E.2d 517). Similarly, the Illinois Supreme Court cited to *Patel* to explain the general process for determining whether a person is in custody for purposes of *Miranda*. Pet. App. 13. The issue in *Patel* involved whether the defendant was entitled to *Miranda* warnings. *Patel*, 313 Ill. App. 3d at 604, 730 N.E.2d at 584-85 (*citing Thompson*, 516 U.S. at 112; *Stansbury v. California*, 511 U.S. 318, 324-25 (1994); *Miranda*, 384 U.S. at 444, 477-78). The courts in *J.W.*, *Armstrong*, and *Patel* based their decisions on federal constitutional law, not state law. None of the courts in *J.W.*, *Armstrong*, or *Patel* made a plain statement to indicate clearly and expressly that they were alternatively basing their decisions on bona fide separate, adequate, and independent grounds. The Illinois Supreme Court's citation to those three state appellate court cases does not even approach the standard set forth in *Long*. *See, e.g.*, *Robinette*, 519 U.S. at 36-37 (reaffirming the *Long* presumption, this Court held that it had jurisdiction because the state court's opinion clearly relied on federal law, even though the state court's opinion mentioned the state constitution and cited to a state case, which itself applied the federal constitution).

In short, this Court has jurisdiction because the Illinois Supreme Court based its decision exclusively on federal constitutional law. The Illinois Supreme Court never referred to state law in its opinion. The court never made a plain statement to indicate clearly and expressly that its decision was alternatively based on bona fide separate,

adequate, and independent grounds as required by *Long*. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).

II. THE ILLINOIS SUPREME COURT'S USE OF A "MODIFIED" REASONABLE PERSON STANDARD CONFLICTS WITH THIS COURT'S DECISION IN *YARBOROUGH V. ALVARADO* AND THIS COURT'S PRIOR DECISIONS REGARDING CUSTODY FOR PURPOSES OF *MIRANDA*.

Respondent argues that *Alvarado* is distinguishable (Opp. at 19-20), but fails to address the language used by this Court in that case in rejecting the notion that its precedents justified modification of the objective reasonable person standard to include consideration of the defendant's age. In *Alvarado*, this Court explained that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." *Alvarado*, 124 S.Ct. at 2151. The Illinois Supreme Court, like the Ninth Circuit in *Alvarado* and respondent in her brief here, "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics . . . could be viewed as creating a subjective inquiry." *Alvarado*, 124 S.Ct. at 2151-52.

The Illinois Supreme Court relied heavily on the Ninth Circuit's opinion in *Alvarado*. Pet. App. 15-17. After noting that the same rationale used by the Ninth Circuit to modify the reasonable person standard to take into account the characteristics of juveniles should be applied to the mentally retarded, the Illinois Supreme Court employed its own modified test and held that "a reasonable person *with defendant's mental capacity* would have

believed he or she was in custody and not free to leave the police station." Pet. App. 19 (emphasis added).

This Court's rejection of the Ninth Circuit's reasoning puts the Illinois Supreme Court's opinion into conflict with this Court's *Alvarado* decision and the myriad of other decisions of this Court that describe the custody test as an objective one, as set forth in the petition. Pet. 9-10. While *Alvarado* was decided in the context of a federal habeas corpus case, petitioner acknowledged this in the petition and explained why that makes it even more important that this Court grant certiorari here and decide this issue on the merits. Pet. 12-13. Unlike *Alvarado*, this case presents the Court with the opportunity on direct review to squarely decide the issue of whether the objective *Miranda* custody test should incorporate a suspect's personal characteristics, such as a suspect's mental capacity, as part of that inquiry.

Respondent's argument that the Illinois Supreme Court's decision actually followed the holding of *Stansbury v. California*, 511 U.S. 318 (1994), is equally meritless. Opp. 20, 22. In *Stansbury*, this Court observed that "[o]ur decisions make clear that the initial determination of custody depends on the *objective* circumstances of the interrogation, *not on the subjective views harbored by* either the interrogating officers or *the persons being questioned*." *Stansbury*, 511 U.S. at 323 (emphasis added). This Court explained in *Alvarado* that "[i]t is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation." *Alvarado*, 124 S.Ct. at 2151. The Illinois Supreme Court effectively turned the objective test into a subjective one when it held that "a reasonable person with defendant's mental capacity would have believed that he or she was in custody and not free to leave the police station." Pet. App. 19. Rather than provide "clarity and logical meaning to

[the] *Stansbury* requirement" as respondent argues (Opp. 22), the Illinois Supreme Court's opinion violates the requirement in *Stansbury* that the custodial inquiry be objective. As noted in the petition (Pet. 8), the Illinois Supreme Court failed even to acknowledge that the *Miranda* custody test is an objective one.

Respondent then resumes her argument that the Illinois Supreme Court's decision was based on Illinois law. Opp. 20-21. As explained in Section I, *supra*, the court grounded its decision solely on federal constitutional law. The court cited several cases from the federal circuits and other states in determining whether the respondent was in custody for purposes of *Miranda*. The court's citations to *Armstrong* and *J.W.*, which respondent highlights on page 21 of her brief, did not transform its reasoning to being grounded in Illinois law. As explained above, both *Armstrong* and *J.W.* involved issues solely under the federal constitution. Moreover, both of those cases addressed the issue of whether each defendant was under arrest for purposes of the Fourth Amendment, not whether the defendants were in custody for purposes of *Miranda*. *Armstrong*, 318 Ill. App. 3d at 614-15, 743 N.E.2d at 220-21 (*citing Dunaway v. New York*, 442 U.S. 200 (1979)); *J.W.*, 274 Ill. App. 3d at 952-53, 956, 960-62, 654 N.E.2d at 521-22. The court's inclusion of those two state appellate court cases did not turn its decision into one based on state law, especially since the court never once expressly discussed state law and focused instead on federal and other states' opinions regarding custody under *Miranda*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the judgment of the Illinois Supreme Court should be vacated and remanded for reconsideration in light of *Yarborough v. Alvarado*, 541 U.S. ___, 124 S.Ct. 2140 (2004).

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorney for Petitioner

Of Counsel:

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois

RENEE G. GOLDFARB
Counsel of Record
ALAN J. SPELLBERG
JOHN E. NOWAK
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496